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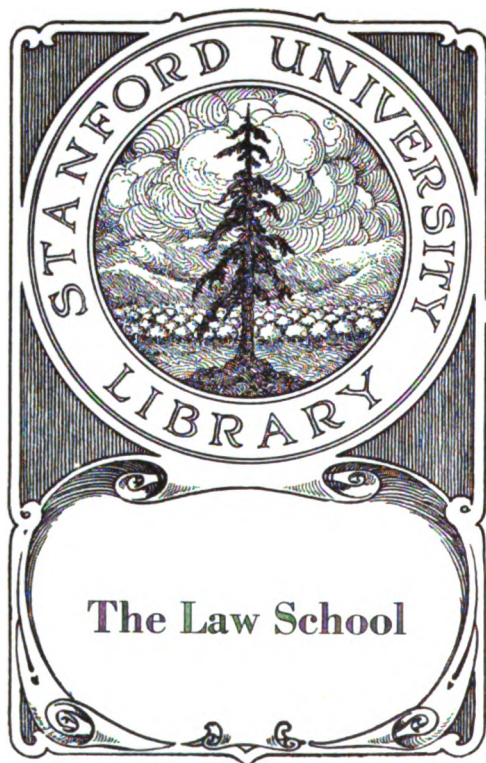
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71A









**REPORTS OF CASES**

**DETERMINED IN**

**THE SUPREME COURT**

**OF THE**  
**STATE OF CALIFORNIA.**

---

**C. P. POMEROY,**  
**REPORTER.**

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**VOLUME 110**

**WITH**  
**NOTES ON CALIFORNIA REPORTS.**

**SAN FRANCISCO:**  
**BANCROFT-WHITNEY COMPANY,**  
**LAW PUBLISHERS AND LAW BOOKSELLERS,**  
**1906.**

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## Organization of Supreme Court.

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[Constitution, article 6, section 2.]

§ 2. The Supreme Court shall consist of a chief justice and six associate justices. The court may sit in departments and in Bank, and shall always be open for the transaction of business. There shall be two departments, denominated, respectively, Department One and Department Two. The chief justice shall assign three of the associate justices to each department, and such assignment may be changed by him from time to time. The associate justices shall be competent to sit in either department, and may interchange with each other by agreement among themselves, or as ordered by the chief justice. Each of the departments shall have the power to hear and determine causes and all questions arising therein, subject to the provisions hereinafter contained in relation to the court in Bank. The presence of three justices shall be necessary to transact any business in either of the departments, except such as may be done at chambers, and the concurrence of three justices shall be necessary to pronounce a judgment. The chief justice shall apportion the business to the departments, and may, in his discretion, order any cause pending before the court to be heard and decided by the court in Bank. The order may be made before or after judgment pronounced by a department; but where a cause has been allotted to one of the departments, and a judgment pronounced thereon, the order must be made within thirty days after such judgment, and concurred in by two associate justices, and if so made it shall have the effect to vacate and set aside the judgment. Any

four justices may, either before or after judgment by a department, order a case to be heard in Bank. If the order be not made within the time above limited, the judgment shall be final. No judgment by a department shall become final until the expiration of the period of thirty days aforesaid, unless approved by the chief justice, in writing, with the concurrence of two associate justices. The chief justice may convene the court in Bank at any time, and shall be the presiding justice of the court when so convened. The concurrence of four justices present at the argument shall be necessary to pronounce a judgment in Bank; but if four justices, so present, do not concur in a judgment, then all the justices qualified to sit in the cause shall hear the argument; but to render a judgment, a concurrence of four judges shall be necessary. In the determination of causes, all decisions of the court in Bank or in departments shall be given in writing, and the grounds of the decision shall be stated. The chief justice may sit in either department, and shall preside when so sitting, but the justices assigned to each department shall select one of their number as presiding justice. In case of the absence of the chief justice from the place at which the court is held, or his inability to act, the associate justices shall select one of their own number to perform the duties and exercise the powers of the chief justice during such absence or inability to act.



## Supreme Court Commissioners.

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[Statutes 1889, page 13.]

**SECTION 1.** The Supreme Court of the State of California shall immediately upon the expiration of the term of office of the present Supreme Court Commissioners appoint five persons of legal learning and personal worth as Commissioners of said Court. It shall be the duty of said Commissioners, under such rules and regulations as said Court may adopt, to assist in the performance of its duties and in the disposition of the numerous causes now pending in said Court undetermined. The said Commissioners shall hold office for the term of four years from and after their appointment, during which time they shall not engage in the practice of the law. They shall each receive a salary equal to the salary of a Judge of said Court, payable at the same time and in the same manner. Before entering upon the discharge of their duties they shall each take an oath to support the Constitution of the United States, and the Constitution of the State of California, and to faithfully discharge the duties of the office of Commissioner of the Supreme Court to the best of their ability. The said Court shall have power to remove any and all members of said Commission at any time by an order entered on the minutes of said Court, and all vacancies in said Commission shall be filled in like manner.

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## TABLE OF CASES REPORTED.

---

Ahrens, Potter v.....	674
Anderson v. Hinshaw .....	68a
Arbios v. County of San Bernardino.....	553
Ashworth, Butler v.....	614
Ayres, Blythe v.....	226
 Bachman, Curtiss v.....	433
Bailey v. Market Street Cable Railway Company.....	320
Bailey Loan Company v. Hall.....	490
Baker v. Southern California Railway Company.....	455
Bancroft v. Bancroft .....	374
Bankers' Life Association, Northey v.....	547
Barnes v. Barnes .....	418
Beisel, In re .....	267
Biddick v. Kobler .....	191
Birkholm, Pierce v.....	669
Blythe v. Ayres .....	226
Blythe, Davis v.....	231
Blythe, Estate of .....	226, 229, 231
Board of Supervisors of San Francisco, Truman v.....	128
Booth, Yore v.....	238
Bowman v. White .....	23
Boyce v. Fisk .....	107
Boyer v. Superior Court .....	401
Brooks v. San Francisco and North Pacific Railway Co.....	173
Brown v. Campbell .....	644
Buckley v. Gray .....	339
Burleson, Fernandez v.....	164
Burrell, Robertson v.....	568
Butler v. Ashworth .....	614
 California State Bank v. Webber.....	538
Campbell, Brown v.....	644
Carroll, McGrath v.....	79
Cass, Wittenbrock v.....	1
Castro v. Geil .....	292
Cavallaro v. Texas and Pacific Railway Co.....	348
Chisholm v. Keyfauber .....	102
City of Eureka, Richardson v.....	441
Clark, Ex parte .....	405
Clarke, Hibernia Savings and Loan Society v.....	27
Clos, Estate of .....	494

Conlan v. Sullivan .....	624
Connors, Estate of .....	408
Cosby v. Superior Court.....	45
County of San Bernardino, Arbios v.....	553
County of Siskiyou v. Gamlich.....	94
Crittenden, Wickersham v.....	332
Curtiss v. Bachman .....	433
Daggett v. Gray .....	169
Davis v. Blythe .....	231
Delaney, Estate of .....	563
Delaney, McCurrie v.....	563
Dietrick, Kirschner v.....	502
Dixon v. Schermeier .....	582
Donnell, Wheeler v.....	655
Ducy, First National Bank of Fresno v.....	69
Eagle Lake Land and Irrigation Company, Keener v.....	627
Easterbrook v. Farquharson.....	311
Ellert, Laver v.....	221
Ervin, Henigan v.....	37
Estate of Blythe .....	226, 229, 231
Estate of Clos .....	494
Estate of Connors .....	408
Estate of Delaney .....	563
Estate of Mullin .....	252
Estate of Pearsons .....	524
Estate of Ryer .....	556
Estate of Walker .....	387
Estate of Welch .....	605
Ex parte Clark .....	405
Ex parte Nichols .....	651
Farquharson, Easterbrook v.....	311
Fay, Rauer v.....	361
Fernandez v. Burleson .....	164
Fife, In re .....	8
First National Bank of Fresno v. Dusy.....	69
Fischer v. Superior Court .....	129
Fisk, Boyce v.....	107
French v. McCarthy .....	12
Freese v. Pennie .....	467
Gamlich, County of Siskiyou v.....	94
Geil, Castro v.....	292
Gibson v. Wheeler .....	243
Giletti v. Saracco .....	428
Gratia, Peters v.....	89
Grand Lodge Ancient Order of United Workmen of California, Kumle v. ....	204
Gray, Buckley v.....	339
Gray, Daggett v.....	169
Gregory v. Spieker .....	150
Griswold v. Pieratt .....	259
Grunsky v. Parlin .....	179

Haines v. Snedigar .....	18
Hall, Bailey Loan Company v.....	490
Hawkins, Smith v.....	122
Hazard, Smith v.....	145
Healy, Ward v.....	587
Hellings, Moroney v.....	219
Hemmenway, Schlicker v.....	579
Henningsan, Richter v.....	530
Henigan v. Ervin .....	37
Hibernia Savings and Loan Society v. Clarke.....	27
Hinshaw, Anderson v.....	682
Holliday, Ryan v.....	335
Hopkins, Warren v.....	506
Howland v. Oakland Consolidated Street Railway Company....	513
Hyde, Visalia and Tulare Railroad Company v.....	632
In re Beisel .....	267
In re Blythe .....	226, 229, 231
In re Clos .....	494
In re Connors .....	408
In re Fife .....	8
In re Mullin .....	252
In re Patton .....	33
In re Pearsons .....	524
In re Ramazzina .....	488
In re Ryer .....	556
In re Walker .....	387
In re Welch .....	605
James, People v.....	155
Kamaunu, People v.....	609
Keener v. Eagle Lake Land and Irrigation Company.....	627
Keyfauber, Chisholm v.....	102
Kiefer v. Laventhal .....	667
Kirschner v. Dietrick .....	502
Knowlton v. Mackenzie .....	183
Kobler, Biddick v.....	191
Krouse v. Woodward .....	638
Kumle v. Grand Lodge Ancient Order United Workmen of California .....	204
Laventhal, Kiefer v.....	667
Laver v. Ellert .....	221
Levy v. Magnolia Lodge, No. 29, I. O. O. O.....	297
Mackenzie, Knowlton v.....	183
Magnolia Lodge, No. 29, I. O. O. F., Levy v.....	297
Mahon, Schwiesau v.....	543
Mahoney v. San Francisco and San Mateo Railway Company....	471
Market Street Cable Railway Company, Bailey v.....	320
McCarthy, French v.....	12
McCarthy v. Mt. Tecarte Land and Water Company.....	687
McCurrie v. Delaney .....	563
McGrath v. Carroll .....	79

McKune v. Santa Clara Valley Mill and Lumber Company.....	480
Meherin v. Saunders .....	463
Menzies, People v.....	447
Merced Bank, Rosenthal v.....	198
Moroney v. Hellings .....	219
Mt. Tecarte Land and Water Co., McCarthy v.....	687
Muller v. Rowell .....	318
Mullin, In re .....	252
Murray, Pauly v.....	13
Nichols, Ex parte .....	651
Northey v. Banker's Life Association .....	547
Oakland Consolidated Street Railway Co. v. Howard.....	513
Oakland Consolidated Street Railway Co., Redfield v.....	277
Parke & Lacy Company v. White River Lumber Company.....	658
Parlin, Grunsky v.....	179
Patton, In re .....	33
Pauly v. Murray .....	13
Pearsons, Estate of .....	524
Pennie, Freese v.....	467
People v. James .....	155
People v. Kamaunu .....	609
People v. Menzies .....	447
People v. Shaughnessy .....	598
People v. Thomas .....	41
People v. Ward .....	369
People v. Wong Chong Suey .....	117
Peters v. Gracia .....	89
Pieratt, Griswold v.....	259
Pierce v. Birkholm .....	669
Potter v. Ahrens .....	674
Prey v. Stanley .....	423
Purcell v. Young .....	605
Ramazzina, In re .....	488
Randol v. Scott .....	590
Rauer v. Fay .....	361
Redfield v. Oakland Consolidated Street Railway Company.....	277
Rice v. Trinity County .....	247
Richardson v. City of Eureka.....	441
Richardson, Vance v.....	414
Richter v. Henningsan .....	539
Robertson v. Burrell .....	568
Rose, Wise v.....	159
Rosenthal v. Merced Bank .....	198
Rowell, Muller v.....	318
Ryan v. Holliday .....	335
Ryer, In re .....	556
San Bernardino County, Arbios v.....	553
San Francisco and North Pacific Railway Company, Brooks v....	173
San Francisco and San Mateo Railway Company, Mahoney v....	471
Santa Clara Valley Mill and Lumber Company, McKune v.....	480



Sarraco, Giletti v.....	428
Saunders, Meherin v.....	463
Schermeier, Dixon v.....	582
Schlicker v. Hemenway .....	579
Schwiesau v. Mahon .....	543
Scott, Randol v.....	590
Sehorn v. Williams .....	621
Shaughnessy, People v.....	598
Siskiyou County v. Ganlich .....	94
Smith v. Hawkins .....	122
Smith v. Hazard .....	145
Snedigar, Haines v.....	18
Souc, Western Granite and Marble Company v.....	431
Southern California Railway Company, Baker v.....	445
Southern Pacific Railroad Company, Williams v.....	457
Spieker, Gregory v.....	150
Stanley, Prey v.....	423
Sullivan, Conlan v. ....	624
Sunset Telephone and Telegraph Company, Yearsley v.....	236
Superior Court, Boyer v. ....	401
Superior Court, Cosby v. ....	45
Superior Court, Fischer v. ....	129
Superior Court, Terry v. ....	85
Superior Court, White v. ....	54, 60
Superior Court, Wulff v. ....	215
Supervisors of San Francisco, Truman v.....	128
 Taylor, Witte v.....	 224
Terry v. Superior Court .....	85
Texas and Pacific Railway Company, Cavallaro v.....	348
Thomas, People v.....	41
Trinity County, Rice v.....	247
Truman v. Supervisors of San Francisco.....	128
 Vance v. Richardson .....	 414
Visalia and Tulare Railroad Company v. Hyde.....	632
 Walker, Estate of .....	 387
Ward v. Healy .....	587
Ward, People v.....	369
Warren v. Hopkins .....	506
Webber, California State Bank v.....	538
Welch, Estate of .....	605
Western Granite and Marble Company v. Souc.....	431
Wheeler v. Donnell .....	655
Wheeler, Gibson v.....	243
White, Bowman v.....	23
White v. Superior Court .....	54, 60
White River Lumber Company, Parke & Lacy Company v.....	658
Whittenbrock v. Case .....	1
Wickersham v. Crittenden .....	332
Williams, Sehorn v.....	621
Williams v. Southern Pacific Railroad Company.....	457

Wise v. Rose .....	159
Witte v. Taylor .....	224
Wong Chong Suey, People v.....	117
Woodward, Krouse v.....	638
Wulff v. Superior Court .....	215
Yearsley v. Sunset Telephone and Telegraph Company.....	236
Yore v. Booth .....	238
Young, Purcell v.....	605

## CASES NOT REPORTED.

---

- Bahwell v. Smith. Judgment and order refusing a new trial affirmed on the authority of *Daw v. Niles*, 104 Cal. 106....Sac. 54
- Bell v. Woodward. Judgment affirmed on the authority of *Krouse v. Woodward*, 110 Cal. 638..... 15973
- Diggins v. Mahon. Judgment and order refusing a new trial affirmed on the authority of *Schwiesau v. Mahon*, 110 Cal. 543 . .... 16029
- Everett v. Los Angeles Con. Electric Ry. Co. Motion to strike out portion of brief denied.....L. A. 62
- Flick v. Bell. Judgment and order refusing a new trial affirmed upon a review of the evidence and findings.....Sac. 11
- Fogel v. San Francisco and San Mateo Railway Company. Judgment and order refusing a new trial affirmed upon a review of the evidence ..... 16011
- Ford v. Cauhape. Judgment and order refusing a new trial affirmed . .... 15900
- Guttery v. Wishon. Appeal dismissed on the authority of *In re Curtiss*, 108 Cal. 661, and *Wheeler v. Donnell*, 110 Cal. 655..Sac. 74
- Haight v. Sexton. Judgment and order refusing a new trial affirmed upon a review of the findings..... 15843
- Hawley v. Gray Brothers Artificial Stone and Paving Co. Judgment and order refusing a new trial affirmed on the authority of *Hawley v. Gray Brothers Artificial Stone and Paving Co.*, 106 Cal. 337 ..... 15909
- Krouse v. Woodward. Judgments affirmed on the authority of *Krouse v. Woodward*, 110 Cal. 638..... 15972
- Leverone v. Hildreth. Judgment and order refusing a new trial affirmed, the evidence being conflicting..... 18382
- Mutter v. I. X. L. Lime Company. Order denying a new trial reversed for error in the admission of evidence..... 15891
- Newell v. Steele. Judgment and order refusing a new trial affirmed, the evidence being conflicting..... 16012
- People v. Knight. Appeal from a judgment convicting the defendant of rape, and from an order refusing a new trial, reversed for errors in the rejection of evidence.....Crim. 42

- Rauer v. Welsh. Judgment and order refusing a new trial reversed on the authority of Rauer v. Fay, 110 Cal. 363..... 16030
- Riggs v. Eagle Lake Land and Irrigation Company. Judgment affirmed in part, and reversed in part, on the authority of Keener v. Eagle Lake Land and Irrigation Company, 110 Cal. 627 .....Sac. 14
- Stimson Mill Company v. Riley. Judgment and order denying a new trial, in an action to foreclose mechanics' liens, affirmed upon a review of the evidence.....L. A. 3
- Wardlaw v. California Railway. Judgment of nonsuit affirmed, in an action to recover for alleged negligence, upon a review of the evidence ..... 15880
- White v. Adler. Order refusing a change of the place of trial reversed on the authority of Smith v. Smith, 88 Cal. 572.. 18357
- Wise v. Williams. Judgment and order refusing a new trial reversed, upon a review of the evidence and findings..... 18317

# **CASES APPROVED, DISAPPROVED, CRITICISED, AND DISTINGUISHED.**

---

<b>Bury v. Young, 98 Cal. 446. Approved.....</b>	<b>6</b>
<b>Chambers v. Satterlee, 40 Cal. 497. Criticised.....</b>	<b>547</b>
<b>Curtis, In re, 108 Cal. 661. Approved.....</b>	<b>655</b>
<b>Fischer v. Superior Court, 98 Cal. 67. Distinguished.....</b>	<b>143</b>
<b>Hart v. Carnall-Hopkins Co., 103 Cal. 132. Approved.....</b>	<b>457</b>
<b>Hollis, Ex parte, 59 Cal. 405. Distinguished.....</b>	<b>407</b>
<b>Leverone v. Hildreth, 80 Cal. 139. Distinguished.....</b>	<b>17</b>
<b>Liddell, Ex parte, 93 Cal. 633. Approved.....</b>	<b>653</b>
<b>People v. Edwards, 93 Cal. 153. Approved.....</b>	<b>453</b>
<b>People v. Hammond, 66 Cal. 655. Approved.....</b>	<b>451</b>
<b>People v. Pond, 89 Cal. 140. Approved.....</b>	<b>452</b>
<b>Preston v. Hill, 50 Cal. 43. Approved.....</b>	<b>180</b>
<b>[110 Cal.]</b>	<b>(xix)</b>

## TABLE OF CASES CITED.

Adams v. Blankenstein, 2 Cal. 413.....	356
Adams v. Messinger, 147 Mass. 185.....	643
Agassiz v. Superior Court, 90 Cal. 101.....	58
Ah Men, Ex parte, 77 Cal. 198.....	65
Alberti v. N. Y. etc. R. R. Co., 118 N. Y. 77.....	254
Aldrich v. Palmer, 24 Cal. 513.....	286, 523
Alston v. Alston, 34 Ala. 27.....	276
Alvarado v. Nordholt, 95 Cal. 116.....	297
Amesbury v. Bowditch etc. Ins. Co., 6 Gray, 596.....	310
Andrews v. Glenville W. Co., 50 N. Y. 282.....	438
Andrews v. Mokelumne Hill Co., 7 Cal. 336.....	461
Atkins v. Gamble, 42 Cal. 86.....	643
Auzerais v. Naglee, 74 Cal. 60.....	263
Avery v. Mickle, 85 Ky. 435.....	155
Aynsworth v. Pratchett, 13 Ves. 320.....	276
Bailey v. Sloan, 65 Cal. 387.....	40
Baird v. Crank, 98 Cal. 293.....	263
Baird v. Peall, 92 Cal. 235.....	214
Baker v. Baker, 13 Cal. 87.....	422
Baker v. Fireman's etc. Ins. Co., 79 Cal. 41.....	236
Barlow v. Grant, 1 Vern. 255.....	275
Barney v. Vigoreaux, 92 Cal. 631.....	337
Barnhart v. Fulkerth, 92 Cal. 155.....	559
Banquier's Appeal, 88 Cal. 302.....	561
Baxter v. Hart, 104 Cal. 344.....	461
Beck v. Vancouver Ry. Co., 25 Or. 32.....	486
Behlow v. Fischer, 102 Cal. 208.....	137, 143, 144
Bell v. Hudson, 73 Cal. 285.....	576, 577
Benedict v. Cozzens, 4 Cal. 381.....	176
Berney v. Drexel, 33 Hun, 34.....	172
Bernheim v. Christal, 76 Cal. 567.....	182
Besondy, In re, 32 Minn. 385.....	276
Bettis v. Townsend, 61 Cal. 333.....	575
Bewick v. Muir, 83 Cal. 370.....	338
Bills v. Silver King Min. Co., 106 Cal. 9.....	578
Bishop v. Fulkerth, 68 Cal. 607.....	359
Blackburn v. Nelson, 100 Cal. 336.....	93
Blackwood v. Cutting Packing Co., 71 Cal. 461.....	551
Blair v. Hamilton, 32 Cal. 52.....	216
Blake v. United States, 103 U. S. 237.....	451
Blakeslee v. Starring, 34 Wis. 538.....	153
Blankman v. Vallejo, 15 Cal. 646.....	236
Blythe v. Ayres, 96 Cal. 532.....	233
Blythe v. Ayres, 102 Cal. 254.....	228, 233
Booth v. Hoskins, 75 Cal. 271.....	113, 116
Boston v. Haynes, 31 Cal. 107.....	509
Bowen v. Aubrey, 22 Cal. 566.....	306
Boyd v. Blankman, 29 Cal. 19.....	295, 296
Boyd v. Burrell, 60 Cal. 280.....	509
Brady v. Wilcoxson, 44 Cal. 245.....	317
Bragg v. Shain, 49 Cal. 131.....	665

Brandt v. Wheaton, 52 Cal. 430.....	449
Breeze v. Brooks, 97 Cal. 72.....	512
Brewster v. Hartley, 37 Cal. 15.....	319
Bridge v. Brown, 2 Younge & C. 181.....	275
Brison v. Brison, 75 Cal. 525.....	5
Broderick Will Case, 21 Wall. 503.....	296
Broder v. Conklin, 98 Cal. 360.....	76, 187
Brooks v. S. F. etc. Ry. Co., 110 Cal. 173.....	672
Brouner v. Wetzlar, 55 Cal. 419.....	672
Brown v. Campbell, 100 Cal. 635.....	647
Brown v. Hall, 14 R. I. 249.....	113
Brown v. Kentfield, 50 Cal. 129.....	358
Bryce, Goods of, 2 Curt. 325.....	394
Buckley v. Howe, 86 Cal. 605.....	579
Buckley v. Superior Court, 96 Cal. 119.....	64, 65
Burton, In re, 93 Cal. 463.....	228
Bury v. Young, 98 Cal. 446.....	67
Bustamente v. Stewart, 55 Cal. 115.....	438
Butler v. Duncan, 47 Mich. 94.....	114
Buzby v. Philadelphia Traction Co., 126 Pa. St. 559.....	329
Calderwood v. Peyser, 42 Cal. 110.....	57
Callahan v. Hickey, 63 Cal. 438.....	68
Cameto v. Dupuy, 47 Cal. 79.....	202
Campbell v. Coburn, 77 Cal. 36.....	446
Campbell v. International L. etc. Soc., 4 Bosw. 298.....	551
Carriger's Estate, 107 Cal. 618.....	203
Carroll v. Ellis, 63 Cal. 440.....	202
Carter v. Paige, 77 Cal. 64.....	589
Centerville etc. Ditch Co. v. Bachtold, 109 Cal. 111.....	559
Central Pac. R. R. Co. v. Placer Co., 43 Cal. 365.....	64, 65
Chambers v. Satterlee, 40 Cal. 497.....	547
Chamberlain v. Lincoln, 129 Mass. 70.....	308
Chapin v. Bourne, 8 Cal. 294.....	176
Chapin v. Clemitson, 1 Barb. 311.....	460
Chapman v. Bank of California, 88 Cal. 419.....	589
Chapman v. Bank of Cal., 97 Cal. 155.....	578
Chicago etc. Ry. Co. v. Ingraham, 131 Ill. 659.....	327
Childs v. Lyons, 3 Robt. 704.....	439
Christian, Goods of, 2 Rob. Ecc., 110.....	305
Church v. Atchinson etc. R. R. Co., 1 Okla. 44.....	355
Clark, Goods of, 2 Curt. 329.....	394
Clark v. Rawson, 2 Denio, 135.....	18
Clark v. Taylor, 91 Cal. 552.....	266
Clarke, Goods of, 4 Jur. N. S., 243.....	394
Coburn v. Goodall, 72 Cal. 498.....	317
Cohen, Ex parte, 5 Cal. 494.....	66
Cohen v. Knox, 90 Cal. 266.....	172
Cole v. Wilcock, 99 Cal. 549.....	178
Coleman, In re, 111 N. Y. 220.....	255
Colton etc. Co. v. Swartz, 99 Cal. 284.....	520
Commonwealth v. Lannan, 153 Mass. 287.....	602
Coudee v. Barton, 62 Cal. 1.....	76
Cook, In re, 77 Cal. 229.....	76
Coope, v. Lowerre, 1 Barb. Ch. 45.....	412
Cooper v. Frederick, 9 Ala. 738.....	310
Coonradt v. Hill, 79 Cal. 590.....	585
Conner v. Hutchinson, 17 Cal. 279.....	693
Cordor v. Morse, 57 Cal. 301.....	175
Cowing v. Rogers, 34 Cal. 655.....	116
Cox v. McLaughlin, 76 Cal. 60.....	317
Crane v. Ford, 1 Hopk. Ch.....	217
Crim v. Kessing, 89 Cal. 478.....	76

Crocker v. Carpenter, 98 Cal. 421.....	520
Crooker v. Benton, 93 Cal. 365.....	585
Cross v. Cal. St. etc. Ry. Co., 102 Cal. 313.....	329, 330
Curtis, In re, 108 Cal. 661.....	656
Curtiss v. Bachman, 84 Cal. 216.....	436
Cushman v. Thayer Mfg. Co. 76 N. Y. 365.....	643
Cushing v. Marston, 12 Cush. 431.....	459
Damrell v. San Joaquin County, 40 Cal. 154.....	98
Dashiell v. Slingerland, 60 Cal. 653.....	40
Davenport v. Brooklyn C. R. R. Co., 100 N. Y. 632.....	329
Davis v. Chouteau, 32 Minn. 548.....	460
Davis v. MacDonough, 109 Cal. 547.....	510, 631
Davis v. Proprietors etc. 8 Metc. 321.....	310
Davis v. Russell, 52 Cal. 611.....	359
Davis v. Southern Pac. Co., 98 Cal. 13.....	176
Daw v. Niles, 104 Cal. 106.....	542
Dawson v. Schloss, 93 Cal. 194.....	214
De Leon, Estate of, 102 Cal. 537.....	277
Demartin v. Demartin, 85 Cal. 75.....	413
Dennison v. Chapman, 105 Cal. 448.....	462
Derby v. Stevens, 64 Cal. 288.....	365
Desmond v. Dunn, 55 Cal. 248.....	452
Dias v. Phillips, 59 Cal. 293.....	291, 576
Dickinson v. Vanderpoel, 2 Hun, 626.....	460
Diefendorff v. Hopkins, 95 Cal. 343.....	221
Dobbins v. Dollarhide, 15 Cal. 374.....	404
Doebler's Appeal, 64 Pa. St. 9.....	427
Dolan v. Court of Good Samaritan, 128 Mass. 437.....	308
Dorland, Estate of, 63 Cal. 281.....	469
Dougherty v. Hitchcock, 35 Cal. 524.....	547
Dreyfous v. Adams, 48 Cal. 131.....	176
Driscoll v. M. S. etc. Ry. Co., 97 Cal. 553.....	486
Dumphy v. Guindon, 13 Cal. 30.....	40
Dunn v. Hannibal etc. R. R. Co., 68 Mo. 268.....	460
Dunn v. Tozer, 10 Cal. 167.....	461
Eddelbuttel v. Durrell, 55 Cal. 277.....	214
Edgar v. Stevenson, 70 Cal. 286.....	446
Egan v. Egan, 90 Cal. 15.....	76, 187
Elevator Case, 17 Fed. Rep. 201.....	596
Elias v. Verdugo, 27 Cal. 418.....	202
Elliott v. Russell, 92 Ind. 526.....	417
Elmer v. Association, 19 N. Y. Supp. 289.....	209
El Modelo Cigar Co. v. Gato, 25 Fla. 886.....	155
Elwood v. Western Union T. Co., 45 N. Y. 553.....	236
Esrey v. S. P. Co., 103 Cal. 541.....	329, 330
Eynon, Goods of, 3 L. R. P. & D. 92.....	394
Farmer v. Ukiah Water Co., 56 Cal. 11.....	585
Farmers' etc. Bank v. Board of Equalization, 97 Cal. 317.....	65
Felix v. Patrick, 145 U. S. 317.....	578
Fenton v. Second Ave. R. R. Co., 126 N. Y. 625.....	329
First Nat. Bank v. De la Guerra, 61 Cal. 109.....	202
Fischer v. Superior Court, 98 Cal. 67.....	143, 144
Fish v. Kelly, 17 Com. B., N. S., 194.....	343
Fitch's Appeal, 10 Pa. St. 461.....	466
Fitzell v. Leaky, 72 Cal. 477.....	585
Fitzgerald v. Fernandez, 71 Cal. 504.....	202
Flint, Estate of, 100 Cal. 395.....	255
Foley v. Bullard, 99 Cal. 516.....	461
Ford v. Thompson, 19 Cal. 119.....	672
Forquer v. Forquer, 19 Ill. 71.....	77



Foss v. Foss, 12 Allen, 26.....	423
French Bank Case, 53 Cal. 495.....	140, 141
Frisch v. Caler, 21 Cal. 71.....	337
Gebhart v. Burkett, 57 Ind. 378.....	417
German Reformed Church v. Seibert, 3 Pa. St. 282.....	307
Gibbons v. Mahon, 136 U. S. 549.....	534
Giblin v. Jordan, 6 Cal. 416.....	202
Gillespie v. Jones, 47 Cal. 264.....	176
Gilman v. Curtis, 66 Cal. 116.....	436, 437, 691
Givens v. Bradley, 3 Bibb, 192.....	417
Gladding v. Follett, 2 Demarest, 58.....	276
Godey v. Godey, 39 Cal. 157.....	505
Golden Gate etc. M. Co. v. Superior Court, 65 Cal. 187.....	311, 630
Gorton v. Ferdinando, 64 Cal. 11.....	40
Goss v. Strelitz, 54 Cal. 640.....	167
Gould, Ex parte, 99 Cal. 360.....	52
Graham v. Harmon, 84 Cal. 181.....	693
Graham v. Linden, 50 N. Y. 547.....	316
Graham v. Plate, 40 Cal. 493.....	155
Grant v. Burr, 54 Cal. 298.....	113
Grant v. Superior Court, 106 Cal. 324.....	58
Grattan v. Wiggins, 23 Cal. 29.....	576
Gregg v. San Francisco etc. R. R. Co., 59 Cal. 312.....	176
Green, Ex parte, 1 Jac. & W. 253.....	275
Green v. Redding, 92 Cal. 548.....	221
Green v. Thornton, 96 Cal. 67.....	263, 264
Gridley v. Dorn, 57 Cal. 78.....	162
Guilfoyle, In re, 96 Cal. 598.....	259
Hager v. S. P. Co., 98 Cal. 310.....	331
Hall v. Ashby, 2 Mont. 489.....	198
Hall v. U. S. Ins. Co., 5 Gill. 484.....	636
Hammond v. American etc. Ins. Co., 10 Gray, 306.....	551
Hanson v. McCue, 43 Cal. 178.....	589
Hardman v. Sims, 3 Ala. 747.....	577
Hardt v. Heidweyer, 152 U. S. 547.....	579
Harnett v. Bleecker S. etc. R. R. Co., 49 N. Y. Sup. Ct. 185.....	329
Harper v. Fox, 7 Watts & S. 142.....	466
Harper v. Hildreth, 99 Cal. 265.....	87, 560
Harrelson v. Tonich, 107 Cal. 627.....	542
Harrington v. Brown, 77 N. Y. 72.....	17
Harrington v. Higham, 15 Barb. 524.....	492
Harris v. Barnhart, 97 Cal. 546.....	650
Harrison v. Hebbard, 101 Cal. 152.....	140
Harrison v. Peabody, 34 Cal. 178.....	176
Hart v. Carnall-Hopkins Co., 103 Cal. 132.....	457
Hart v. Cooper, 47 Cal. 77.....	266
Hartford etc. R. R. Co. v. Boorman, 12 Conn. 530.....	636
Harvey v. Foster, 64 Cal. 296.....	465
Harwood v. Marye, 8 Cal. 580.....	576
Hasbrook v. Paddock, 1 Barb. 635.....	596
Havemeyer v. Superior Court, 84 Cal. 327.....	53, 58, 59, 140
Hawkes v. Phillips, 7 Gray, 284.....	18
Hayne v. Hermann, 97 Cal. 259.....	6
Hecht v. Slaney, 72 Cal. 363.....	577
Heinlen v. Sullivan, 64 Cal. 378.....	452
Helena v. Albertose, 8 Mont. 499.....	198
Henderson v. Ilsley, 11 Smedes & M. 11.....	84
Hennen, Ex parte, 13 Pet. 261.....	451
Hewitt v. Dean, 91 Cal. 10.....	542
Hibernia etc. Soc. v. Fella, 54 Cal. 598.....	33
Hickman v. Alpaugh, 21 Cal. 225.....	357

Hicks v. Coleman, 25 Cal. 122.....	358
Hicks v. Michael, 15 Cal. 107.....	440
Hill v. Kidd, 43 Cal. 615.....	162
Himmelman v. Henry, 84 Cal. 104.....	431
Hinckley v. Ayres, 105 Cal. 357.....	233
Hinkel v. Donohue, 88 Cal. 598.....	87
Hogan v. Pac. Ed. League, 99 Cal. 248.....	310
Hollis, Ex parte, 59 Cal. 405.....	407
Horn v. Jones, 28 Cal. 194.....	585
Hough v. Hunt, 2 Ohio, 495.....	114
Howard v. Taylor, 90 Ala. 241.....	155
Hoyt v. Nevada Co. etc. R. R. Co., 68 Cal. 644.....	361
Humboldt County v. Dinsmore, 75 Cal. 604.....	98
Hunt v. Wright, 47 N. H. 400.....	427
Huttemeier v. Albro, 18 N. Y. 48.....	586
Independent Order of Foresters v. Zak, 136 Ill. 185.....	209
Insurance Co. v. Gridley, 100 U. S. 614.....	209
Irvine v. Adler, 44 Cal. 559.....	94
Isham v. Parker, 3 Wash. 774.....	693
Jackson v. Silvernail, 15 Johns. 278.....	596
Janes v. Throckmorton, 57 Cal. 368.....	575
Jennings v. Le Breton, 80 Cal. 8.....	149
Johnson v. Ashland Lumber Co., 45 Wis. 119.....	172
Johnson v. Brooks, 93 N. Y. 342.....	643
Johnston v. Russell, 37 Cal. 670.....	162
Jordan v. McKenzie, 30 Miss. 32.....	577
Kahl v. Love, 37 N. J. L. 5.....	344
Kellogg v. Gilbert, 10 Johns. 220.....	188
Kellogg v. Paine, 8 How. Pr. 329.....	693
Kelly v. Hendrie, 26 Mich. 255.....	329
Kirkendall, Estate of, 43 Wis. 167.....	528
Knoedler v. Glaenger, 55 Fed. Rep. 898.....	154
Knowlton v. McKenzie, 110 Cal. 183.....	510
Kohl v. Lilienthal, 81 Cal. 378.....	534
Kower v. Gluck, 33 Cal. 401.....	672, 673
Lafond v. Deems, 81 N. Y. 507.....	308
Lamb v. Harbaugh, 105 Cal. 692.....	446
Lambert v. Haskell, 80 Cal. 611.....	440
Langdon v. Gray, 22 Hun, 511.....	438
Lashus v. Chamberlain, 5 Utah, 140.....	155
Lathrop v. Bampton, 31 Cal. 24.....	82
Le Caux v. Eden, 2 Doug. 594.....	378, 381
Lechler v. Chapin, 12 Nev. 65.....	198
Lee v. S. P. R. R. Co., 101 Cal. 118.....	523
Leonard v. Wildes, 36 Me. 265.....	18
Leverone v. Hildreth, 80 Cal. 139.....	17
Lewis v. Clarkin, 18 Cal. 399.....	492
Lichtenberg v. McGlynn, 105 Cal. 45.....	84
Liddell, Ex parte, 93 Cal. 633.....	653
Lillis v. Emigrant Ditch Co., 95 Cal. 553.....	445
Little v. Caldwell, 101 Cal. 553.....	576
Livermore v. Campbell, 52 Cal. 75.....	57
Loaiza v. Superior Court, 85 Cal. 11.....	64
Longmeid v. Holliday, 6 Ex. 761.....	344
Lord v. Goldberg, 81 Cal. 599.....	40
Los Angeles v. Lankershim, 100 Cal. 532.....	187
Los Angeles County v. San Jose etc. Water Co., 96 Cal. 93.....	98, 99
Lovering v. Fogg, 18 Pick. 540.....	18
Lower v. Winters, 7 Cow. 263.....	669
Lynde v. Hough, 27 Barb. 415.....	596

Mahoney v. Aurrecochea, 51 Cal. 429.....	23
Mandlebaum v. McDonell, 29 Mich. 92.....	427
Manning v. Den, 90 Cal. 614.....	546, 547
Marsters v. Lash, 61 Cal. 624.....	357
Marten v. Van Schaick, 4 Paige, 479.....	217
Maxfield v. Johnson, 30 Cal. 545.....	40, 265
McCord v. Seale, 56 Cal. 262.....	461
McFadden v. Crawford, 39 Cal. 662.....	317
McFadden v. Santa Ana &c. Ry. Co., 87 Cal. 467.....	290, 487
McFarland v. McCowen, 98 Cal. 329.....	623
McIntosh v. Ensign, 28 N. Y. 169.....	492
McLane v. Placerville &c. R. R. Co., 66 Cal. 629.....	218
McLaughlin v. Del Re, 64 Cal. 472.....	446
McLeran v. Benton, 73 Cal. 329.....	297
McNaught v. McClaughry, 42 N. Y. 22.....	17
Medbury, Estate of, 48 Cal. 83.....	509, 560
Meehan v. Rourke, 2 Bradf. 385.....	395, 399
Menk v. Home Ins. Co., 76 Cal. 50.....	214
Merced Bank v. Rosenthal, 99 Cal. 42.....	87
Merchants' Nat. Bank v. Northrup, 22 N. J. Eq. 58.....	182
Meredith v. Santa Clara M. Assn., 60 Cal. 617.....	309
Merrill v. Lake, 16 Ohio, 405.....	139
Merrimac Mill Co. v. Bagley, 14 Mich. 501.....	636
Miller, Ex parte, 82 Cal. 454.....	11
Mills v. La Verne Land Co., 97 Cal. 254.....	367
Mills v. Rebstock, 29 Minn. 380.....	200
Mitchell v. Hawley, 79 Cal. 301.....	438
Mix v. Miller, 57 Cal. 356.....	317
Mogk v. Peterson, 75 Cal. 501.....	236
Moies v. Bird, 11 Mass. 436.....	17
Moore, Estate of, 88 Cal. 1.....	502
Moore, Estate of, 96 Cal. 522.....	501, 566
More v. Calkins, 85 Cal. 177.....	296
Morgan v. Southern Pac. Co., 85 Cal. 501.....	286
Mortimer v. Marder, 93 Cal. 172.....	357
Mowry v. Heney, 86 Cal. 471.....	310
Muir v. Superior Court, 58 Cal. 361.....	66
Mulroy v. Knights of Honor, 28 Mo. App. 463.....	209
Murphy v. Bennett, 68 Cal. 528.....	413
Murray v. Green, 64 Cal. 363.....	426, 427
Muschamp v. Lancaster etc. Ry. Co., 8 Mees. & W. 421.....	354
Natoma etc. Min. Co. v. Parker, 16 Cal. 83.....	439
Neall v. Hill, 16 Cal. 145.....	140
Newport v. Cook, 2 Ashm. 332.....	275
Niles, Matter of, 113 N. Y. 556.....	501
Norman v. Wells, 17 Wend. 163.....	680
Notman v. Green, 90 Cal. 173.....	337
Oakley v. Stanley, 5 Wend. 523.....	586
Olery v. Brown, 51 How. Pr. 92.....	307
Oliver, Goods of, 21 Spinks, 57.....	395
O'Neil, In re, 91 N. Y. 520.....	390
Ord v. De la Guerra, 18 Cal. 67.....	575
Osborne v. Van Horn, 2 Fla. 360.....	276
Otto v. Journeyman Tailors' etc. Union, 75 Cal. 308.....	307
Parke v. White R. L. Co., 101 Cal. 37.....	664
Parker v. Reay, 76 Cal. 103.....	214
Parks v. Brinkerhoff, 2 Hill, 663.....	18
Pasadena v. Stimson, 91 Cal. 259.....	100
Patchin v. Peek, 38 N. Y. 39.....	460
Patterson v. Sharp, 41 Cal. 133.....	316

Peale v. Thurmond, 77 Va. 753.....	275
Peltz v. Eichele, 62 Mo. 171.....	155
People v. Ah Jake, 91 Cal. 98.....	121
People v. Blankenship, 52 Cal. 619.....	295
People v. Board of Delegates, 14 Cal. 479.....	64
People v. Center, 66 Cal. 551.....	413
People v. Edson, 68 Cal. 549.....	373
People v. Edwards, 93 Cal. 153.....	453
People v. Election Commr's, 3 Pac. Rep. 412.....	452
People v. Estrada, 53 Cal. 600.....	121
People v. Fowler, 88 Cal. 138.....	373
People v. Freeman, 92 Cal. 359.....	121
People v. Freese, 83 Cal. 453.....	454
People v. Frigerio, 107 Cal. 151.....	520, 602
People v. Frisbee, 18 Cal. 402.....	492
People v. Hammond, 66 Cal. 655.....	451, 452, 453, 454
People v. Johnson, 30 Cal. 98.....	657
People v. Johnson, 91 Cal. 265.....	602
People v. Krummer, 4 Park. Cr. 217.....	158
People v. Laurence, 137 N. Y. 517.....	602
People v. Lee, 107 Cal. 477.....	374
People v. Markham, 64 Cal. 157.....	373
People v. Munroe, 100 Cal. 664.....	158
People v. Newman, 96 Cal. 605.....	454
People v. Noyo Lumber Co., 99 Cal. 459.....	297
People v. Parsons, 6 Cal. 487.....	372
People v. Pond, 89 Cal. 140.....	452, 454
People v. Rae, 66 Cal. 425.....	603
People v. Raschke, 73 Cal. 378.....	602
People v. Robinson, 46 Cal. 94.....	309
People v. Rose, 85 Cal. 378.....	601
People v. Sansome, 84 Cal. 449.....	43
People v. Scoggins, 37 Cal. 679.....	416
People v. Shaber, 32 Cal. 36.....	372
People v. Shepard, 28 Cal. 115.....	57
People v. Smallman, 55 Cal. 185.....	602
People v. St. George Soc., 28 Mich. 261.....	307, 308
People v. Tomlinson, 102 Cal. 23.....	602
People v. Wheatley, 88 Cal. 117.....	44
People ex rel. Davidson v. Perry, 79 Cal. 105.....	658
Perri v. Beaumont, 88 Cal. 108.....	190
Picquet v. Cormick, Dud. 21.....	265
Piedmont etc. Ins. Co. v. Ewing, 92 U. S. 377.....	209
Plimpton v. Bigelow, 93 N. Y. 592.....	523
Porter v. Seiler, 23 Pa. St. 424.....	417
Powelson v. Lockwood, 82 Cal. 613.....	11
Preston v. Hill, 50 Cal. 43.....	189
Priest v. Brown, 100 Cal. 626.....	647
Pugh v. Brown, 19 Ohio 211.....	139
Queen v. Russett, L. R. 2 Q. B. 312.....	602
Quinlan v. Noble, 75 Cal. 250.....	586
Quinn v. Windmiller, 67 Cal. 461.....	94
Ragsdale v. Nagle, 106 Cal. 336.....	154
Randall v. Carpenter, 88 N. Y. 293.....	438
Randall v. Hunter, 69 Cal. 80.....	492
Rankin v. Amazon Ins. Co., 89 Cal. 209.....	550
Rathbone v. Sterling, 25 Kan. 448.....	196, 198
Rend v. Chicago etc. Ry. Co., 8 Ill. App. 517.....	327
Renton v. Conley, 49 Cal. 185.....	245
Reynolds v. Hosmer, 51 Cal. 205.....	586

Reynolds v. Pixley, 6 Cal. 165.....	203
Reynolds v. Reynolds, 3 Allen, 605.....	422
Ricaud, Estate of, 70 Cal. 69.....	566
Rice v. Gashirie, 13 Cal. 54.....	174
Richardson v. Eureka, 96 Cal. 443.....	443
Rider v. Edgar, 54 Cal. 127.....	358
Riggs v. Commercial Mut. Ins. Co., 125 N. Y. 7.....	534
Robbins v. Butter, 13 Cal. 496.....	693
Roberts v. Phillips, 4 El. & B. 450.....	393
Roberts v. Treadwell, 50 Cal. 521.....	337
Robertson v. Burrell, 40 Ind. 328.....	529
Robertson v. Fleming, 4 Macq. 167.....	343
Robinson v. Irish etc. Soc., 67 Cal. 135.....	307
Robinson v. W. P. R. Co., 48 Cal. 409.....	358
Robinson v. Yates City Lodge, 86 Ill. 598.....	307
Rochester Railway Co. v. Robinson, 133 N. Y. 246.....	172
Roddy v. Missouri Pac. Ry. Co., 104 Mo. 234.....	343, 344
Rowe v. Table Mountain etc. Co., 10 Cal. 442.....	630
Rowley v. Stray, 32 Mich. 70.....	529
Rush v. French, 1 Ariz. 124.....	521
Rutenberg v. Main, 47 Cal. 221.....	461
Ryan v. Andrews, 21 Mich. 229.....	529
Sacry v. Lobree, 84 Cal. 41.....	490
Sands v. Lyon, 18 Conn. 18.....	552
San Diego W. Co. v. Steamship Co., 101 Cal. 216.....	438, 439
San Francisco v. Mooney, 106 Cal. 586.....	564
San Joaquin etc. Co. v. West, 99 Cal. 347.....	75
San Jose S. Bk. v. Stone, 59 Cal. 183.....	263
Savings Bank v. Superior Court, 103 Cal. 34.....	140
Savings Bank v. Ward, 100 U. S. 195.....	343
Savings Society v. Thompson, 32 Cal. 347.....	149
Schenck v. Hartford etc. Ins. Co., 71 Cal. 28.....	172
Schneider v. Brown, 85 Cal. 205.....	446
Scott v. Third Ave. R. R. Co., 59 Hun, 456.....	329
Screwman's etc. Assn. v. Benson, 76 Tex. 552.....	307
Scroufe v. Clay, 71 Cal. 123.....	337
Seaton v. Son, 32 Cal. 481.....	202
Senter v. Davis, 38 Cal. 450.....	643
'76 Land & W. Co. v. Superior Court, 93 Cal. 139.....	51
Shain v. Forbes, 82 Cal. 583.....	492
Shea v. Potrero etc. R. R. Co., 44 Cal. 414.....	327, 358, 475
Sherman v. Mitchell, 46 Cal. 578.....	176
Sherwood v. Dunbar, 6 Cal. 53.....	537
Shortridge v. Allen, 2 Tex. C. App. 193.....	577
Shumway v. Leakey, 67 Cal. 460.....	357
Sichel v. Carrillo, 42 Cal. 507.....	76
Sieber v. Blanc, 76 Cal. 173.....	221
Siebert v. Chosen Friends, 23 Mo. App. 268.....	209
Siemers v. Eisen, 54 Cal. 418.....	486
Silcox v. Lang, 78 Cal. 118.....	416
Sill v. Reese, 47 Cal. 294.....	358
Sime v. Norris, 8 Phila. 84.....	115
Simpson v. Applegate, 75 Cal. 342.....	172
Sipple v. State, 99 N. Y. 289.....	236
Slavonic etc. Assn. v. Superior Court, 65 Cal. 500.....	57
Slee v. Bloom, 19 Johns. 456.....	310
Smith v. Hawkins, 110 Cal. 122.....	585
Smith v. Ling, 68 Cal. 324.....	657
Smith v. Shaw, 16 Cal. 88.....	172
Smith v. Taylor, 82 Cal. 541.....	187, 579
Smith v. Walker, 38 Cal. 385.....	576

Smith v. Westerfield, 88 Cal. 374.....	228
Snow v. Holmes, 71 Cal. 142.....	154
Solomon v. Reese, 34 Cal. 29.....	40
Soule v. Bruce, 67 Me. 584.....	417
Spect v. Spect, 88 Cal. 437.....	113
Speer v. Miller, 37 N. J. Eq. 492.....	529
Spencer v. Citizens' Mut. etc. Ins. Co., 142 N. Y. 505.....	209
Spieker v. Lash, 102 Cal. 38.....	152, 154
Spotts v. Hanley, 85 Cal. 155.....	214
Staudart v. Round Valley etc. Co., 77 Cal. 399.....	585
Staude v. Election Comm'rs, 61 Cal. 313.....	452
Stearns v. Stearns, 16 Mass. 167.....	139
Steele v. Marsicano, 102 Cal. 666.....	171
Sternes, Ex parte, 77 Cal. 156.....	65
Stewart v. S. C. A. L. of H., 36 Mo. App. 319.....	209
Stoddart v. Superior Court, 108 Cal. 303.....	57
Stone v. Dickinson, 5 Allen, 29.....	619
Streeter v. Rush, 25 Cal. 68.....	681
Struttmeister v. Superior Court, 71 Cal. 322.....	57
Sukeforth v. Lord, 87 Cal. 399.....	358
Sullivan v. N. Y. etc. Co., 119 N. Y. 348.....	460
Sullivan v. Royer, 72 Cal. 248.....	446
Supreme Lodge v. Johnson, 78 Ind. 110.....	209
Sweet v. Mowry, 71 Hun, 381.....	438, 439
Sweetser v. Dobbins, 65 Cal. 529.....	446
Taylor v. Reynolds, 92 Cal. 573.....	10
Taylor v. W. P. R. R. Co., 45 Cal. 323.....	416
Till v. Gibson, 66 Cal. 247.....	290, 487
Thompson, Estate of, 101 Cal. 349.....	277
Thompson v. Phenix Ins. Co., 136 U. S. 287.....	550
Thompson v. Smith, 28 Cal. 528.....	672
Thorpe v. White, 13 Johns. 53.....	264
Thurston v. Haskell, 81 Me. 303.....	438
Tobin v. Western etc. Soc., 72 Iowa, 261.....	209
Tolman v. Smith, 85 Cal. 280.....	586
Tompkins v. Clay S. R. R. Co., 66 Cal. 163.....	619
Treadway v. Wilder, 8 Nev. 91.....	198
Trenor v. C. P. R. R. Co., 50 Cal. 222.....	461
Truckee Lodge v. Wood, 14 Nev. 293.....	665
United States v. Corwine, 1 Bond, 339.....	665
Upson v. Badeau, 3 Bradf. 15.....	501
Upton v. Hansbrough, 3 Biss. 417.....	636
Urton v. Price, 57 Cal. 270.....	619
Van Every v. Ogg, 59 Cal. 563.....	221
Varley v. Coppard, L. R. 7 Com. P. 505.....	595
Vaughan v. Cal. Cent. Ry. Co., 83 Cal. 18.....	26
Von Roun v. Superior Court, 58 Cal. 358.....	64
Wagner v. Hansen, 103 Cal. 107.....	167
Walden v. Murdock, 23 Cal. 549.....	672
Walker v. Millard, 29 N. Y. 375.....	264
Ware v. Walker, 70 Cal. 595.....	585
Warfield v. Booth, 33 Md. 63.....	155
Warren v. Davenport etc. Ins. Co., 31 Iowa, 464.....	534
Warren v. Hopkins, 110 Cal. 506.....	560
Washburn v. Huntington, 78 Cal. 573.....	490
Watson v. Sutro, 77 Cal. 609.....	560
Wax, In re, 106 Cal. 343.....	255
Webb v. Trescony, 76 Cal. 621.....	461

Webster v. San Pedro etc. Co., 101 Cal. 326.....	266
Weeks v. Hull, 19 Conn. 376.....	552
Weinreich v. Johnson, 78 Cal. 254.....	461
Weisert v. Muehl, 81 Ky. 336.....	241
Welch, In re, 86 Cal. 179.....	606
Wendt v. Ross, 33 Cal. 650.....	461
Wheaton v. North Beach etc. R. R. Co., 36 Cal. 590.....	523
Wheeler v. Kassabaum, 76 Cal. 90.....	672
White v. Brownell, 4 Daly, 329.....	307
White v. Superior Court, 110 Cal. 54.....	648
Whiteside v. Noyac Cottage Assn., 84 Hun, 555.....	438
Wickersham v. Crittenden, 93 Cal. 17.....	333, 334
Wierbitszky, In re, 88 Cal. 333.....	509
Wilkinson v. Parrott, 32 Cal. 102.....	402
Wilkes v. Rogers, 6 Johns. 567.....	276
Willamette &c. Co. v. Kremer, 94 Cal. 209.....	167
Williams v. Macartney, 69 Cal. 556.....	40
Williams v. Wilson, 4 Sand. Ch. 380.....	218
Wilson v. California Cent. R. R. Co., 94 Cal. 166.....	356, 367, 361
Wilson v. Wallace, 8 Serg. & R. 53.....	459, 460
Winterbottom v. Wright, 10 Mees. & W. 109.....	345
Wittenbroch v. Belmer, 62 Cal. 558.....	672
Wolf v. Fleischacker, 5 Cal. 244.....	202
Wong You Ting, Ex parte, 106 Cal. 296.....	9, 10
Wood v. Carpenter, 101 U. S. 135.....	578
Wood v. Franks, 56 Cal. 217.....	386
Woods v. Varnum, 85 Cal. 639.....	657
Woodside v. Hewit, 107 Cal. 141.....	509, 560
Works v. Merritt, 105 Cal. 467.....	691
Young v. Montgomery etc. Co., 2 Wood, 606.....	139
Zabriskie v. Smith, 13 N. Y. 322.....	460
Zellerbach v. Allenberg, 99 Cal. 69.....	113

# STATUTES AND CODE CITATIONS.

## CALIFORNIA.

	PAGE
CONSTITUTION (1879).—Art. IV., sec. 25 .....	31
Art. V., sec. 8 .....	453
Art. VI., sec. 4 .....	39
Art. VI., sec. 5 .....	264
Art. VI., sec. 6 .....	67
Art. XIII., sec. 5 .....	541
Art. XX., sec. 4 .....	451
Art. XX., sec. 16 .....	451-453
STATUTES.—1858, April 21, Swamp Lands .....	91
1868, March 30, Townsites .....	194
1870, p. 738, New City Hall .....	222
1876, March 24, New City Hall .....	223, 224
1878, April 1, Police Commissioners .....	450, 453
1878, p. 949, Warehouseman .....	359
1880, Insolvent Act .....	36, 181, 406
1885, p. 115, Townsite .....	194, 197
1889, March 11, Industrial School .....	653
1891, p. 196, Streets .....	147
1891, p. 322, County Government .....	622
1891, March 31, Mechanics' Liens .....	630
1893, p. 207, County Government .....	32
1893, p. 364, County Government .....	554, 555
1895, p. 165, New City Hall .....	222

## CODE OF CIVIL PROCEDURE.

SECTION	PAGE	SECTION	PAGE
13 .....	551	454 .....	692
337 .....	152, 289	473 .....	504
338 .....	152, 163, 294, 295	488 .....	200
339 .....	537	530 .....	438
369 .....	575	531 .....	145
370 .....	89, 425	554 .....	140, 141, 144
377 .....	283, 285, 289	578 .....	492
382 .....	460	580 .....	492
384 .....	425	581 .....	227
410 .....	31, 32	601 .....	416
430 .....	289, 460, 487	632 .....	75
433 .....	460	633 .....	75, 76
434 .....	289, 337, 460, 487	634 .....	32
438 .....	263, 264, 266	657 .....	286
440 .....	266	659 .....	213
443 .....	152	661 .....	560, 561
448 .....	203	668 .....	227



SECTION	PAGE	SECTION	PAGE
670 . . . . .	560	1452 . . . . .	501, 575
855 . . . . .	265	1493 . . . . .	83
939 . . . . .	57, 174	1499 . . . . .	84
942 . . . . .	309	1500 . . . . .	83, 338
946 . . . . .	403	1581 . . . . .	575
954 . . . . .	403	1582 . . . . .	575
963 . . . . .	40, 57, 567	1585 . . . . .	574
964 . . . . .	40	1618 . . . . .	566
1023 . . . . .	620	1633 . . . . .	561
1045 . . . . .	190	1658 . . . . .	561
1049 . . . . .	504	1659 . . . . .	561
1068 . . . . .	57	1660 . . . . .	561, 562
1102 . . . . .	58	1664 . . . . .	227, 228, 232-234
1103 . . . . .	58	1704 . . . . .	227
1183 . . . . .	168, 510	1854 . . . . .	418
1187 . . . . .	165, 167, 168	1858 . . . . .	396
1188 . . . . .	510, 511	1881 . . . . .	254, 256
1191 . . . . .	363, 510	1911 . . . . .	445
1195 . . . . .	165	1962 . . . . .	106
1365 . . . . .	410	2048 . . . . .	418
1369 . . . . .	410	2053 . . . . .	417

## CIVIL CODE.

SECTION	PAGE	SECTION	PAGE
11 . . . . .	551	1566 . . . . .	379
14 . . . . .	396	1664 . . . . .	550
38 . . . . .	296	1671 . . . . .	680
39 . . . . .	296	1673 . . . . .	153, 679
40 . . . . .	296	1674 . . . . .	153, 679
162 . . . . .	425	1682 . . . . .	263
349 . . . . .	635	1691 . . . . .	379
485 . . . . .	456	1697 . . . . .	263
662 . . . . .	585	1708 . . . . .	385
711 . . . . .	426, 427	1915 . . . . .	315
802 . . . . .	585	1917 . . . . .	316, 317
805 . . . . .	585	1918 . . . . .	112
811 . . . . .	126, 585	1942 . . . . .	220
852 . . . . .	5	2120 . . . . .	356
1183 . . . . .	245	2127 . . . . .	358, 359
1262 . . . . .	203	2131 . . . . .	357
1264 . . . . .	203	2251 . . . . .	576
1276 . . . . .	390	2349 . . . . .	251
1386 . . . . .	526, 527	2819 . . . . .	665
1394 . . . . .	527	2844 . . . . .	665
1401 . . . . .	290	3281 . . . . .	316, 385
1411 . . . . .	126, 127	3287 . . . . .	316
1428 . . . . .	385	3366 . . . . .	642
1442 . . . . .	595	3384 . . . . .	641, 642
1531 . . . . .	263	3385 . . . . .	642
1559 . . . . .	346	3540 . . . . .	167

## POLITICAL CODE.

SECTION	PAGE	SECTION	PAGE
343 . . . . .	251	2681 . . . . .	98
483 . . . . .	250	2690 . . . . .	98
865 . . . . .	251	3969 . . . . .	250
875 . . . . .	451, 452	4176 . . . . .	31
877 . . . . .	251	4442 . . . . .	194

## PENAL CODE.

SECTION	PAGE	SECTION	PAGE
7 . . . . .	371	666 . . . . .	43
12 . . . . .	654	667 . . . . .	43
15 . . . . .	656	950 . . . . .	371
165 . . . . .	372, 374	952 . . . . .	371
292 . . . . .	88	1093 . . . . .	42, 43
332 . . . . .	601-603	3320 . . . . .	603
484 . . . . .	601		

## UNITED STATES.

Revised Statutes, sec. 2339, Water Rights . . . . .	125
2340, Water Rights . . . . .	125
2387, Townsite . . . . .	194
3251, Distillery . . . . .	534-536

## NEW YORK.

Code Civil Procedure, sec. 835, Wills . . . . .	254
836, Wills . . . . .	255

REPORTS OF CASES  
DETERMINED IN  
THE SUPREME COURT  
OF THE  
STATE OF CALIFORNIA.

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[No. 18331. Department Two.—November 7, 1895.]

GEORGE F. WITTENBROCK, RESPONDENT, v. WILLIAM H. CASS, ADMINISTRATOR, ETC., ET AL., APPELLANTS. D. E. ALEXANDER ET AL., INTERVENORS.

**TRUST—STATUTE OF FRAUDS—VERBAL AGREEMENT.**—A verbal agreement between a mother and son that he and his family should live with her on premises which she had bought and paid for with her own money, and that he should have the title thereto after her death, provided that he would pay the taxes and insurance on the property and keep the house in good repair, and would furnish her with all necessary care and with board and lodging during her life, does not, upon the performance of the conditions, raise a constructive trust which is excepted from the rule that a trust in realty can only be created by an instrument in writing, and the alleged verbal agreement cannot be enforced as against a mortgage executed by the mother for money loaned, although the mortgagee had notice of the verbal agreement.

**ID.—DEPOSIT OF DEED IN ESCROW—PAROL EVIDENCE OF CONDITIONS.**—In an action to foreclose the mortgage to which the son was a party, evidence is admissible to show that the mother executed to him a deed of the property prior to the mortgage, and placed it in the hands of another person as a depository, to be delivered after her death, and that the mortgagee had notice of the execution and deposit of the deed at the time he received his mortgage; and parol evidence is admissible to show all the facts and conditions upon which the deed was deposited.

**ID.—VALIDITY OF DEED DELIVERED IN ESCROW—INTENTION OF GRANTOR—QUESTION OF FACT.**—The essential requisite to the validity of a deed transferred in escrow under such circumstances is, that when placed in the hands of a third party it has passed beyond the power of the grantor for all time, and that question is to be determined by the grantor's intention in the matter, and is a question of fact to be solved by the light of all the circumstances surrounding the transaction.

APPEAL from a judgment of the Superior Court of the County of Sacramento and from an order denying a new trial. MATT F. JOHNSON, Judge.

The facts are stated in the opinion.

*Johnson & Johnson*, for Appellants.

Where the circumstances of a transaction are such that the person who takes the title to property cannot be permitted to hold and enjoy it, in whole or in part, without necessarily violating some principle of equity, a constructive trust will be raised for the benefit of the party entitled in equity to its beneficial enjoyment; and such trusts are excepted from the operation of the statute of frauds. (Story's Equity Jurisprudence, sec. 1195; *Millard v. Hathaway*, 27 Cal. 139; *Mandeville v. Solomon*, 33 Cal. 44; *Brison v. Brison*, 75 Cal. 525; 7 Am. St. Rep. 189; *Wood v. Rabe*, 96 N. Y. 426; 48 Am. Rep. 640; *Hayne v. Hermann*, 97 Cal. 259; *Nordholt v. Nordholt*, 87 Cal. 552; 22 Am. St. Rep. 268; *Alaniz v. Casenave*, 91 Cal. 41; *Adams v. Lambard*, 80 Cal. 426; *De Mallagh v. De Mallagh*, 77 Cal. 126; *Broder v. Conklin*, 77 Cal. 330; *Butler v. Hyland*, 89 Cal. 575; *Jackson v. Jackson*, 94 Cal. 446.) The conveyance became the grantor's deed presently, and upon the death of Mrs. Cass, the grantor, the title of appellant passed, by relation, from the time the instrument was placed in the hands of the depository. (Devlin on Deeds, secs. 319, 320; *Wheelwright v. Wheelwright*, 2 Mass. 447; 3 Am. Dec. 66; *Hatch v. Hatch*, 9 Mass. 307; 6 Am. Dec. 67; *Foster v. Mansfield*, 3 Met. 412; 37 Am. Dec. 154; *Mather v. Corliss*, 103 Mass. 568; *Hathaway v. Payne*, 34 N. Y. 92; *Stephens v. Rhinehart*, 72 Pa. St. 434; *Stone v. Duvall*, 77 Ill. 475; *Wallace v. Harris*, 32 Mich. 380; *Thatcher v. St. Andrew's Church*, 37 Mich. 264.) As the plaintiff took his mortgage with full notice of the execution of the deed and its deposit with Davis, he acquires no title to or lien in the premises as against appellant, who was the prior grantee. (*McDonald v. Huff*, 77 Cal. 279; *Cannon v. Handley*, 72

Cal. 133; *Conneau v. Geis*, 73 Cal. 176; 2 Am. St. Rep. 785; Civ. Code, sec. 1217; *Boyd v. Brinckin*, 55 Cal. 427.)

*Holl & Dunn*, for Respondent.

The verbal promise of Maria Louisa Cass to convey her land to her son cannot be enforced as such, as it is within the statute of frauds. (Civ. Code, secs. 852, 1624, 1741; Code Civ. Proc., secs. 1971, 1973; *Gallagher v. Mars*, 50 Cal. 23; *Porter v. Muller*, 53 Cal. 677.) The essential element to create a constructive trust is, that fraud, either actual or constructive, must have intervened. (*Noe v. Roll*, 134 Ind. 115; *Pomeroy's Equity Jurisprudence*, sec. 1044.) The mere failure to fulfill a promise is not fraud. (*Perry v. McHenry*, 13 Ill. 236; *Wheeler v. Reynolds*, 66 N. Y. 234; *Levy v. Brush*, 45 N. Y. 589; *Burden v. Sheridan*, 36 Iowa, 125; 14 Am. Rep. 505; *Cowan v. Wheeler*, 25 Me. 267; 43 Am. Dec. 283; *Boyd v. Stone*, 11 Mass. 348.) Such promises as were made, under the circumstances here disclosed by the cross-complaint, never were held sufficient to take the case out of the statute of frauds. (*Wheeler v. Reynolds*, 66 N. Y. 227; *Horn v. Keteltas*, 46 N. Y. 610; *Sturtevant v. Sturtevant*, 20 N. Y. 39; 75 Am. Dec. 371; *Evans v. Folsom*, 5 Minn. 422; *Melton v. Watkins*, 24 Ala. 433; 60 Am. Dec. 481; *Scott v. Bush*, 26 Mich. 418; 12 Am. Rep. 311.)

BELCHER, C.—On March 7, 1892, Maria Louisa Cass borrowed of the plaintiff two thousand dollars, for which she executed to him her promissory note and a mortgage to secure payment of the same on certain real property in the city of Sacramento. Mrs. Cass died in May, 1892, and thereafter the defendant, William H. Cass, was duly appointed administrator of her estate. In March, 1893, plaintiff commenced this action to foreclose his said mortgage, making William H. Cass, as administrator and individually, a party defendant.

The case was tried and judgment of foreclosure rendered as prayed for, from which and from an order deny-

ing his motion for a new trial the defendant appeals. The defendant answered the complaint, and then, by way of cross-complaint, set up in substance the following facts: That Maria Louisa Cass was the mother of defendant, and in October, 1882, was seventy-two years of age, infirm in body, without a home, and greatly in need of care and attention; that she had about three thousand seven hundred dollars in money and no other property; that then and there it was agreed between her and defendant that she should purchase in her own name and with her own means a certain lot in the city of Sacramento, and erect a dwelling-house thereon sufficient to accommodate her and defendant and his family, and that after the house should be constructed she and he with his family should move into the same and thenceforth live together; that he should pay the taxes and insurance upon the property and keep the house in good repair, and should furnish her with all necessary care and with board and lodging, and attend her in sickness and in health during her natural life; and that in return therefor she should execute to him a deed of the premises, which should be held in escrow until her death, and should also make a will devising to him all her property and estate, and that she would not in any manner sell, transfer, mortgage, or incumber the said property.

That in pursuance of the aforesaid agreement Mrs. Cass purchased the said lot and erected a dwelling-house thereon at an expense to her of between nineteen hundred and two thousand dollars, and she and defendant with his family moved into the said house and took up their residence there about February 1, 1883, and defendant and his family have ever since resided in said house.

That defendant has in all respects fulfilled said agreement on his part, and has expended in the payment of taxes, insurance, and repairs upon said premises the sum of seven hundred and fifty dollars and upwards. That Mrs. Cass, in pursuance of the said agreement, made her

will devising and bequeathing to defendant all of her property and estate, and also executed to defendant a deed of the said real property, which deed, together with said will, was left in escrow with one Richmond Davis of Sacramento.

That in 1885 Mrs. Cass represented to defendant that she had expended all her money remaining after the purchase of the said lot and the construction of the said house, and that she needed more money for present use; she requested him to advance her money from time to time, and he, on her representation that she had executed a deed of the property to him and placed the same with said Richmond Davis, advanced to her about two hundred and seventy-five dollars.

That in March, 1892, Mrs. Cass, being then feeble in mind and body, executed to the plaintiff the mortgage set out in the complaint, in violation of her agreement with defendant, and without his knowledge or consent, and prior to the execution thereof the plaintiff had full and complete notice of the facts set forth in this cross-complaint.

At the trial defendant offered to prove all the facts set up in his cross-complaint, and, it appearing that the alleged agreement between defendant and his mother was not in writing, all of the offered evidence was objected to as irrelevant, immaterial, and incompetent, and excluded by the court, the plaintiff reserving exceptions.

1. Appellant contends that the court erred in excluding his offered evidence as to the verbal agreement, etc., between himself and his mother, because, if the facts alleged were true, a constructive trust was created in his favor, which was superior to any rights in the property acquired by respondent. (Citing *Brison v. Brison*, 75 Cal. 525; 7 Am. St. Rep. 189, and other cases.)

We do not think this contention can be sustained. It is true that a constructive trust arises by operation of law, and is expressly excepted from the rule that a trust in realty can only be created by an instrument in writing (Civ. Code, sec. 852); and whenever one person

acquires from another the title to real property by fraud, actual or constructive, practiced upon that other, a constructive trust is created which a court of equity will fasten upon the title in his hands. (*Hayne v. Hermann*, 97 Cal. 259.)

This, however, is not such a case as that supposed. Mrs. Cass did not acquire the title to the property in question from her son, nor with his money. She bought the property and paid for it with her own money, and simply agreed with him that he and his family should live with her on the premises, and should have the title thereto after her death, provided he would pay the taxes and insurance on the property, and keep the house in good repair, and would furnish her with all necessary care and with board and lodging during her life.

All of these conditions were performed, but that fact does not, in our opinion, bring the case within the rule declared in any of the cases cited.

2. Appellant further contends that the court erred in excluding the evidence offered to show that Mrs. Cass executed to him a deed of the said property and placed it in the hands of one Davis as a depositary, to be delivered after her death, and also to show that respondent had notice of the execution and deposit of the deed at the time he received his mortgage.

This contention must be sustained. If the deed was executed and left with Davis, and respondent had notice thereof, as claimed, then it was immaterial whether the prior agreement between the parties was verbal or written, and parol evidence to prove all the facts was admissible.

The case of *Bury v. Young*, 98 Cal. 446, 35 Am. St. Rep. 186, is in many respects very similar to this. In that case the authorities were quite fully reviewed, and it was held that the delivery of a deed by the grantor to a third party for the children of the grantor, with instruction to such third party to hold the deed for them without recording it until after the grantor's death, and thereupon to deliver it to them, the grantor parting with



all dominion over the deed and reserving no right to recall it, or to alter its provisions, or to have or enjoy any other or further interest in the premises than to hold the use thereof until his death, constitutes a valid delivery of the deed, which vests the title immediately in the grantee, qualified only by a life tenancy in the grantor, and the depositary becomes the trustee of the grantee.

It was further held that the essential requisite to the validity of a deed, transferred under such circumstances, is that when placed in the hands of a third party it has passed beyond the control of the grantor for all time, and that that question is determined by the grantor's intention in the matter, and is a question of fact to be solved by the light of all the circumstances surrounding the transaction.

It is not necessary to notice the claims of the intervenors. Upon the authority of *Bury v. Young, supra*, the judgment and order should be reversed and the cause remanded for a new trial.

BRITT, C., and SEARLS, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are reversed and the cause remanded for a new trial.

TEMPLE, J., HENSHAW, J.

McFARLAND, J., concurred on the authority of *Bury v. Young, supra*, which must now be taken as final on the subject.

[Crim. No. 99. In Bank.—November 7, 1895.]

IN RE JEANNE FIFE.

**CRIMINAL LAW—TRIAL BY JURY—POLICE COURT—VAGRANCY.**—The legislature may provide for summary proceedings in the police court, without a jury, in cases of such petty offenses as were thus provided for in certain early English statutes, and in cases which are intrinsically of a similar nature and degree, and vagrancy is one of such offenses, for a summary trial of which without a jury the legislature might provide by a general law.

**ID.—RIGHT TO JURY TRIAL—ERROR—APPEAL—JURISDICTION—HABEAS CORPUS.**—There is no valid statutory provision for a trial of a case of vagrancy without a jury; but the denial of a trial by jury in such a case in the police court is merely error to be corrected on appeal, and does not go to the jurisdiction of the court, and cannot be inquired into on *habeas corpus*.

**ID.—WAIVER OF JURY TRIAL—REVIEW UPON HABEAS CORPUS.**—A jury trial may be waived in any civil case and in all criminal cases not amounting to a felony; and in any case in which a jury trial may be waived, and in which a jury trial is not a necessary constituent part of the court, the refusal of the court to allow a jury is mere error, and cannot be reviewed upon *habeas corpus*.

**PETITION** in the Supreme Court for a writ of *habeas corpus*.

The facts are stated in the opinion of the court.

*J. Marion Brooks*, for Petitioner.

The trial of all misdemeanors should be by jury, unless waived by the accused, or unless the legislature has exercised its power to provide for the trial of such offenses summarily without a jury. As the Whitney Act, by virtue of which the police courts of the city of Los Angeles exist, does not provide for such summary trial for vagrancy, the legislature has not exercised its power to provide for the trial of such cases in that city without a jury. (Pen. Code, secs. 1042, 1430, 1435; *Taylor v. Reynolds*, 92 Cal. 573.)

*J. A. Donnell*, District Attorney, and *F. R. Willis*, Deputy, for Respondent.

Vagrancy being a misdemeanor for which a trial by jury is not guaranteed by the constitution, the legislature

has power to provide for the trial of such offenses without a jury. The police court had jurisdiction to try this case without a jury under the Whitney Act. (Pol. Code, secs. 716, 717; 4 Blackstone's Commentaries, 281.) A judgment or proceeding cannot be assailed for mere error on a writ of *habeas corpus*. (Church on Habeas Corpus, 372; *Willis v. Bayles*, 105 Ind. 371; *Ex parte Turner*, 75 Cal. 228; *Ex parte Ah Men*, 77 Cal. 202; 11 Am. St. Rep. 263, and cases cited; *Ex parte Miller*, 82 Cal. 455, and cases cited.)

MCFARLAND, J.—This is a petition for a writ of *habeas corpus*. The petitioner shows that she was convicted in the police court of the city of Los Angeles of the offense of vagrancy; that she appealed to the superior court of the county of Los Angeles, where the judgment of the police court was affirmed, and that she did not waive a jury in the said police court, and expressly made a demand in the superior court for a jury, and said demand was refused. Her contention is that having been tried and convicted, under these circumstances, without the intervention of a jury, her imprisonment is illegal, and that she should be restored to her liberty upon *habeas corpus*.

In the recent case of *Ex parte Wong You Ting*, 106 Cal. 296, we took occasion to inquire somewhat fully into the right of a jury trial in criminal cases, and our conclusion there was that the legislature might provide for summary proceedings without a jury in cases of such petty offenses as were thus provided for in certain early English statutes and in cases which are intrinsically of a similar nature and degree as those mentioned in said statutes. Vagrancy is, we think, one of those offenses, and the legislature might provide by a general law for the summary trial without a jury of persons charged with said offense; but we agree with the superior court of Los Angeles county sitting in bank, whose learned opinion on the subject was presented to us at the argument here, that there is no valid statutory provision for

such a trial without a jury. Conceding, however, that the denial of a jury in such a case would be error, for which the judgment should, on appeal, be reversed by the superior court, still the point is urged here that such denial does not raise a question of jurisdiction which can be considered on *habeas corpus*.

The learned judges of the superior court, in their opinion above noticed, seemed to assume, and perhaps quite naturally, that this court in *Taylor v. Reynolds*, 92 Cal. 573, and *Ex parte Wong You Ting*, *supra*, had decided that the question here involved could be determined on *habeas corpus*. But in those cases the question was not raised, and was not in any manner considered. In *Taylor v. Reynolds*, *supra*, the court, in its opinion, says: "The answer admits all the facts alleged, and waives all objections that might be made to the writ, to the end that the questions sought to be raised may be decided upon their merits"; and in *Ex parte Wong You Ting*, *supra*, we said: "The only question before us necessary to be decided is whether or not appellant was entitled to a jury trial. . . . The point that the refusal of a jury can be reviewed only on appeal is not made." In the case at bar, however, the point is expressly made and insisted on, and cannot be evaded.

Upon a thorough examination of the question we are forced to the conclusion that either in civil or criminal cases the denial of a trial by jury is merely error to be corrected on appeal, and does not go to the jurisdiction of the court, so that it may be inquired into on *habeas corpus*, except in those cases where a jury cannot be waived, and therefore is a necessary constituent part of the court. A jury may be waived in any civil case, and it is not contended by any one that the refusal of a demand for a jury in a civil case affects the jurisdiction, or is anything more than error; and, as a jury may, under the constitution, be waived "in all criminal cases not amounting to a felony," a jury is not a necessary constituent part of a court for the trial of a misde-

meanor, and the refusal of the court to allow a jury on such a trial is mere error. This principle will be found to be established by the general authorities; but as it has been definitely declared by decisions of this court, we need look no further. *Ex parte Miller*, 82 Cal. 454, is determinative of the point. That was *habeas corpus*, and the petitioner demanded his discharge upon the ground that he had been denied a jury trial in the justice's court in which he was convicted; but this court, sitting in bank, remanded the petitioner, and said: "The offense charged was not a felony, and a jury might have been waived. The return of the officer to the alternative writ shows a valid commitment by a court having jurisdiction of the subject matter and of the party. If a jury trial was denied, it was mere error which could not be reached by a writ of *habeas corpus*." Citing authorities. In *Powelson v. Lockwood*, 82 Cal. 613, there was an application for a writ of prohibition to restrain a justice of the peace from trying the petitioner on a charge of vagrancy without a jury—which raised the precise point decided in *Ex parte Miller*, *supra*. In that case it was said: "I think the court properly sustained the opposition to the writ on the first ground above stated, and for the reasons that the justice's court had jurisdiction of the subject matter—the misdemeanor charged—and of the parties; that in denying a jury trial, even if appellant was entitled to it, and in trying or in proposing to try the case without a jury, the justice's court did not exceed or propose to exceed its jurisdiction; and that, even if this action or proposed action of the justice's court was erroneous, it was so only as to the mode of procedure in an action of which that court had jurisdiction."

Upon the foregoing authorities we hold that the denial by the lower court of petitioner's demand for a jury was only error, and does not go to the question of jurisdiction, and therefore cannot be reviewed in the proceeding of *habeas corpus*.

The petitioner is remanded, and the writ dismissed.

BEATTY, C. J., HENSHAW, J., GAROUTTE, J., HARRISON, J., VAN FLEET, J., and TEMPLE, J., concurred.

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[No. 15551. Department One.—November 9, 1895.]

JOHN D. FRENCH, RESPONDENT, v. JAMES MCCARTHY, APPELLANT.

**APPEAL—SERVICE OF NOTICE UPON CODEFENDANT—DISMISSAL.**—Where an action was brought against two defendants upon a contract of guaranty executed by them to the plaintiff, and was tried solely upon issues presented by the separate answer of one of them, and the record does not show that the codefendant had answered the complaint, it appears that a reversal of the judgment would have no effect upon the rights of such codefendant; and it is not necessary, upon an appeal from the judgment, to serve the notice of appeal upon such codefendant, nor will the appeal be dismissed for want of such service.

**MOTION** in the Superior Court to dismiss an appeal from the judgment of the Superior Court of the City and County of San Francisco. D. J. MURPHY, Judge.

The facts are stated in the opinion.

*O'Byrne & Peixotto*, for Appellant.

*Chickering, Thomas & Gregory*, for Respondent.

From the time of the conditional release given him, Joost became an adverse party to the appellant, McCarthy, and a reversal or modification of the judgment or order will materially affect said defendant, in that there will be a joint and several liability imposed upon the two defendants, and Joost's liability for contribution will be affected. (Civ. Code, sec. 1432; *Northern Ins. Co. v. Potter*, 63 Cal. 157; Code Civ. Proc., sec. 438; *Senter v. De Bernal*, 38 Cal. 640; *Thompson v. Ellsworth*, 1 Barb. Ch. 627; *Williams v. Santa Clara Min. Co.*, 66 Cal. 195.) Notice of appeal should have been served on Joost. (*O'Kane v. Daly*, 63 Cal. 317; *Butte County v. Boydston*, 68 Cal. 189; *Toy v. San Francisco R. R. Co.*,

75 Cal. 542; *In re Castle Dome Min. Co.*, 79 Cal. 246; *Miller v. Richards*, 83 Cal. 563; *Harper v. Hildreth*, 99 Cal. 265; *Lancaster v. Maxwell*, 103 Cal. 67.)

**THE COURT.**—The respondent has moved to dismiss the appeal for failure of the appellant to serve his codefendant, Joost, with the notice of appeal. The action was brought against the appellant and Joost upon a contract of guaranty, executed by them to the plaintiff, and was tried solely upon the issues presented by the answer of the appellant. It does not appear from the judgment-roll that Joost has answered the complaint, and the judgment appealed from is against the appellant alone, and contains no reference to Joost. A reversal of this judgment would, therefore, have no effect upon the rights of Joost, as there has been no trial or determination of the plaintiff's claim against him, or of his defense thereto.

The motion is denied.

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[L. A. No. 14. Department One.—November 9, 1895.]

FRED N. PAULY, ETC., RESPONDENT, v. ELI H. MURRAY, APPELLANT.

**PROMISSORY NOTE—SIGNATURE OF SURETY AFTER LOAN OF MONEY—CONSIDERATION.**—Where the payee of a note parts with his money on the faith of a promise by the borrower that he will procure the signature of a surety to the note, the surety is bound, although he does not sign the note until the money is advanced.

**Id.—SURRENDER OF JOINT NOTE—CONSIDERATION FOR INDIVIDUAL NOTE.** Where there is a sufficient consideration for a joint note signed by one of the makers as a surety, the surrender thereof to the surety is a sufficient consideration for the individual note of the surety to the payee.

**APPEAL** from a judgment of the Superior Court of San Diego County and from an order denying a new trial. JAMES A. GIBSON, Judge.

The facts are stated in the opinion.

*Cassius Carter*, and *Withington & Carter*, for Appellant.

Defendant, being a surety only, and the consideration having passed to Burns before his signature, is not liable. (*Brandt on Suretyship*, sec. 9; *Leverone v. Hildreth*, 80 Cal. 139; *Ellis v. Clark*, 110 Mass. 389, 392; 14 Am. Rep. 609; *Pratt v. Hedden*, 121 Mass. 116; Civ. Code, sec. 2831.) The creditor is bound to make a full, fair, and honest communication of every circumstance in his knowledge calculated in any way to influence the surety in answering unto the required obligation. (*Kerr on Fraud*, 122, and cases cited; *Guardian Fire etc. Co. v. Thompson*, 68 Cal. 208; *Franklin Bank v. Cooper*, 36 Me. 179; *Pidcock v. Bishop*, 3 Barn. & C., 605; *Peck v. Durett*, 9 Dana, 486; *Doughty v. Savage*, 28 Conn. 146.)

*Allen & Flint*, for Respondent.

As the bank parted with its money on the promise of Burns that he would procure the defendant's signature to the note, even though the defendant signed the note after the money was advanced, he is liable on the note. (*Moies v. Bird*, 11 Mass. 436; 6 Am. Dec. 179; *Harrington v. Brown*, 77 N. Y. 72; *Leverone v. Hildreth*, 80 Cal. 139; *Hawkes v. Phillips*, 7 Gray, 284; *Lovering v. Fogg*, 18 Pick. 540; *Leonard v. Wildes*, 36 Me. 265; *Parks v. Brinkerhoff*, 2 Hill. 663; *Clark v. Rawson*, 2 Denio, 135; *Randolph on Commercial Paper*, sec. 920; *Williams v. Perkins*, 21 Ark. 18.)

VANCLIEF, C.—Action on a promissory note made by defendant to said bank July 20, 1891, for the sum of five hundred and seventy-eight dollars and eighty cents, payable ninety days after date, with interest at the rate of one per cent per month from date.

It is alleged in the answer of the defendant that this note was made by him as a renewal of a former note for the sum of five hundred dollars and interest, jointly made by him and one Hugh Burns to said bank, on which joint note he was a mere surety, of which the



bank had notice at the time it was signed by him; that said joint note was given to secure a loan of five hundred dollars, made and advanced to Burns by the bank on a note signed by Burns alone, several hours before defendant signed the same as a joint maker with Burns; that at the time defendant signed the last-mentioned note he was ignorant of the alleged facts that the bank had, some hours before, on the same day, actually advanced to Burns the five hundred dollars loaned, and had accepted as security therefor the note signed by Burns alone; that he was induced thus to sign said joint note by a collusive and fraudulent suppression, by Burns and the bank, of the facts that the loan had been made, and that Burns' individual note had been accepted therefor, before he was induced to sign said note as a joint maker; that he remained ignorant of said suppressed facts until long after he individually made the note in suit as a renewal of said joint note; and for these reasons he alleges that there was no consideration for his signature to said joint note, and consequently no consideration for the renewal thereof by the note in suit.

The court below found as facts that the loan to Burns by the bank was solicited by Burns on January 21, 1890, he having been introduced to Collins, the president of the bank, by defendant; that at the time he solicited the loan Burns represented to the bank that defendant would sign a note for the money, if loaned, jointly with him, though defendant was not then present, and had not then promised the bank to sign the note; that thereupon the bank agreed to make the loan on the condition that Burns would procure the signature of defendant to the note as a joint maker; that Burns then signed the note and passed it to the note-clerk of the bank, promising that he would cause defendant to sign it, but the president of the bank then directed the clerk not to enter the note as discounted by the bank until it should be signed by the defendant, but at the same time advanced and delivered the five

hundred dollars loaned to Burns; that thereafter, during banking hours on the same day, the defendant called at the bank and signed the note, and after it was signed it was, in the regular course of business on the same day, entered as a discounted note; that in advancing said money to Burns the bank relied upon the promise of Burns that he would cause defendant to sign the note; that defendant signed the note merely as an accommodation to Burns and received no other consideration therefor, and did not know, at the time he signed, that Burns had before that time received the money loaned; that after the maturity of the note the defendant, at the request of the bank, renewed it by making the note in suit, without any consideration additional to that for the joint note; and "that no fraud or misrepresentation of any kind or character was used, practiced, or made by said bank, or by any one in its behalf, in or about the procurement of the signature of defendant, Murray, either to said original note or to the note sued on in this action."

Upon these findings of fact judgment passed in favor of plaintiff for the amount sued for. The defendant appeals from the judgment and from an order denying his motion for a new trial. Appellant contends: 1. That the findings of fact are not justified by the evidence; and 2. That the facts found do not warrant the judgment.

The only material controversy about the facts relates to the consideration for the first note. If there was a sufficient consideration for the joint note, the surrender thereof to defendant was undoubtedly a sufficient consideration for the individual note of the defendant upon which this action is founded.

In order to establish a sufficient consideration for the first note it was only necessary, in addition to the admitted facts, to find, as the court did find, an affirmative answer to the following questions: Did Burns, before he received the money, promise the bank that he would cause defendant to sign the note? Did the bank advance

the money relying in good faith upon that promise, so that the agreement for the loan and the security therefor was not completely executed until after defendant signed the joint note? I think the evidence, direct and circumstantial, sensibly tended to prove, and therefore justified, these findings. As to the fraud and collusion charged, there is no evidence tending to prove them.

The facts of this case plainly and materially distinguish it from that of *Leverone v. Hildreth*, 80 Cal. 139. In that case the note signed by the defendant had been completely executed by his father, and was two months overdue when defendant signed it, and there was no plausible pretense of any consideration moving to the defendant. By implication that case justifies the judgment in this. Speaking of the authorities cited by the respondent in that case, the court, by the chief justice, said: "They are to the effect that if the payee parts with his money on the faith of a promise by the borrower that he will procure the signature of a surety to his note, the surety is bound if he sign the note after the money is advanced; but such is not the case here." Such, however, is the case at bar. The authorities referred to by the chief justice, so far as reported, are *McNaught v. McClaghry*, 42 N. Y. 22, 1 Am. Rep. 487, and *Harrington v. Brown*, 77 N. Y. 72. In the first of these cases the court said: "The authorities are clear upon the two propositions involved in the question: 1. If Abram had given his note to the plaintiff, and the same had been accepted in performance of the contract without further condition, and the note was yet unmatured, the obtaining an additional indorser would have been a gratuitous act on the part of Abram, and the indorser would not be bound. . . . On the other hand, if Abram had originally agreed with the lender that he would obtain the new indorser, and had obtained the money upon the faith of that promise, then his finding the additional indorser was based upon a valid consideration, and the indorser was held by his signature. To this precise point is the case of *Moies v. Bird*, 11 Mass. 436,

6 Am. Dec. 179, recognized and affirmed in *Hawkes v. Phillips*, 7 Gray, 284; *Lovering v. Fogg*, 18 Pick. 540; *Leonard v. Wildes*, 36 Me. 265. (See, also, *Parks v. Brinkerhoff*, 2 Hill, 663; *Clark v. Rawson*, 2 Denio, 135.)"

I think the judgment and order should be affirmed.

SEARLS, C., and BELCHER, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

HARRISON, J., GAROUTTE, J., VAN FLEET, J.

Hearing in Bank denied.

[Sac. No. 27. Department One.—November 13, 1895.]

GEORGE W. HAINES, ETC., ET AL., APPELLANTS, v.  
R. R. SNEDIGAR, RESPONDENT.

**ACTION UPON NOTE—DEFENSE—WARRANTY—SPECIAL AGREEMENT—BURDEN OF PROOF—EVIDENCE—NONSUIT.**—In an action upon a note, where the answer pleaded that it was given in part payment for a harvester, which was warranted to do good work, and that, subsequent to its execution, it was agreed between the parties that the note should remain until the next harvest, and that the harvester should be put in order to do good work, otherwise the note was to be returned and the contract of purchase rescinded, and alleged that the harvester was not put in order, and that the note was demanded by the defendant, which demand was not complied with, etc., the burden of proof is upon the defendant to prove the new matter alleged in the answer, and the contract pleaded in the answer is not admissible in evidence upon cross-examination of the plaintiffs; and it is error to grant a nonsuit because of mere proof of the contract, in the absence of proof either that the next harvest had not arrived, or that the plaintiffs had been given an opportunity to put the machine in order, and had failed to do so.

**12.—ORDER OF PROOF—CROSS-EXAMINATION OF PLAINTIFFS—INADMISSIBLE EVIDENCE FOR DEFENDANT.**—The defendant is not entitled to offer proof of affirmative matter set up in his answer, until plaintiffs have made their case, and submitted it to the court; and proof of the execution of an agreement relied upon in defense to a note in suit is not proper in cross-examination of the plaintiffs, and its admission in evidence, upon such cross-examination, is error.

**APPEAL** from a judgment of the Superior Court of Stanislaus County. J. H. BUDD, Judge.

The facts are stated in the opinion.

*P. J. Hazen, and James A. Louttit, for Appellants.*

The execution and delivery of the note and its non-payment, which were proven, made a *prima facie* case for plaintiffs, and the subsequent agreement was purely matter of defense. This was matter to be affirmatively established by the defendant. (*Plano Mfg. Co. v. Root*, 3 N. Dak. 165; *Whitney Iron Works Co. v. Reuss*, 40 La. Ann. 112; *Coffin v. Grand Rapids etc. Co.*, 136 N. Y. 655; *Sparks v. Sparks*, 51 Kan. 195.)

*Minor & Ashley, for Respondent.*

The agreement of August 6, 1892, should be read in connection with the note and construed as a part thereof, controlling its operation and effect. (*Tiedeman on Commercial Paper*, sec. 42; *Goodwin v. Nickerson*, 51 Cal. 169.)

SEARLS, C.—This is an action upon a promissory note dated June 10, 1892, made by the defendant, who is respondent here, payable to Houser, Haines & Knight, or order, October 1, 1892, and by them indorsed to plaintiffs. At the trial the court, on motion of defendant, entered a judgment of nonsuit against the plaintiffs, who appeal from the judgment.

The complaint was in the ordinary form upon a promissory note. The answer admitted the making of the note by defendant and its assignment to plaintiffs, and, by way of avoidance, pleaded that the note was given in part payment of a harvester purchased by defendant from the payees of the note, which harvester was warranted by the vendors to do good work, etc.; that thereafter, and on August 6, 1892, a contract in writing was entered into between the parties, by the terms of which it was agreed that the assignors of plaintiff would let the note stand until the next harvest (harvest of 1893), and if the vendors put the harvester in order to do good work defendant would then pay the note, otherwise the

note was to be returned to defendant with two hundred dollars for an old machine received from said defendant; that the vendors did not put the harvester in order to do good work; that defendant demanded his note and the two hundred dollars, which demand was not complied with, etc., and that the plaintiffs had notice of all the facts, etc.

The foregoing is only the substance of the answer, which was pleaded in three separate counts, setting out the written contract, etc. At the trial plaintiff's counsel called as a witness G. W. Haines, one of the plaintiffs, who presented the promissory note, and said it belonged to plaintiffs, and was signed by defendant; whereupon it was admitted in evidence, and the witness added, "No part of that note has been paid."

On cross-examination the witness testified that the consideration of the note was a harvester. "This note and an old 'Young' machine, given to us by Mr. Snedigar as part pay, made up the price. I don't remember what the old machine was rated at; probably three hundred dollars."

Defendant's counsel was then permitted, against the objection of plaintiffs, to prove that after the execution of the note a new agreement was entered into between the parties, which agreement was produced, its execution proven, and thereupon it was, against the objection of plaintiffs, admitted in evidence.

The written agreement is as follows:

"STOCKTON, CAL., Aug. 6, 1892.

*"Messrs. Houser, Haines & Knight.*

"DEAR SIRs: I hereby make you this proposition as a settlement for the harvester that I now have on my ranch, that if you will let my note stand until next harvest I will then give you an opportunity to put the machine in order, and if you can then make the machine do good and satisfactory work I will then pay you the note; otherwise, you return the note to me and two hundred dollars for my old machine.

"R. R. SNEDIGAR."

"August 8, 1892.

*"Mr. R. R. Snedigar:*

"We accept your proposition of August 6, of which the above is a copy. Yours respectfully,

"HOUSER, HAINES & KNIGHT."

Plaintiffs thereupon rested their case, and defendant moved the court to grant a nonsuit, upon the ground that under the new agreement it was provided that "the plaintiffs must make the machine do good and satisfactory work, and there has been no evidence introduced going to show that the machine did do good and satisfactory work, or that any effort was made to make it do good, satisfactory work." The motion was granted and judgment of nonsuit entered.

The action of the court in admitting the evidence objected to and in granting the nonsuit was excepted to, and the rulings thereon are assigned as error. We think the court erred in its rulings. The defense set up by defendant involved the plea of an entirely new and distinct contract, made subsequent to the contract upon which the action was based. It was a plea by way of confession and avoidance, involving new matter to be proven by the defendant. Its allegations are, under our code, to be treated as though denied.

The entire answer is made up of affirmative matter. Whatever was necessary to be alleged therein devolved upon the defendant to prove. But he could not by any recognized rule of procedure offer such proofs until plaintiffs had made their case and submitted it to the court. Plaintiffs called one of their number as a witness. He testified to no single thing that was not admitted by the pleadings, but he was a witness, and as such defendant was entitled to cross-examine him. The limit placed upon cross-examination is so largely within the discretion of the trial court that its action in allowing a wide range to questions upon cross-examination will only be reversed in extreme cases.

The court might, in its discretion, as is often done, permit the defendant to prove by plaintiff's witness,

when on the stand, the due execution of an agreement important to his defense. This course, treated as a mere matter of convenience, was not open to serious objection. To permit this agreement to be then admitted in evidence was, however, quite a different matter.

It was in effect to inject into the case of the plaintiffs a portion of the defense, and was subversive of known and fixed rules of procedure and violative of the whole theory upon which those rules are founded. The proof of the execution of the written agreement of August 6, 1892, was not proper in cross-examination, and its admission in evidence was error.

Greenleaf, in his work on Evidence, volume 1, section 447, after discussing the difficulty of laying down a precise rule in reference to the limit to be placed upon cross-examination, adds: "A party, however, who has not opened his own case will not be allowed to introduce it to the jury by cross-examining the witnesses of the adverse party, though after opening it he may recall them for that purpose."

2. If we treat the agreement as properly in evidence defendant was not entitled to a nonsuit. The note in suit was overdue and upon its face constituted a cause of action. To defeat plaintiffs' apparent right to recover, defendant avers that the parties have agreed to two things: 1. To postpone payment until the next harvest; 2. That defendant should give the plaintiffs an opportunity to put the machine in order, and that they should do so before the note was payable.

To sustain these propositions, defendant was bound to prove one of two things: 1. That the next harvest had not arrived; or 2. That if it had arrived and passed, that he had given plaintiffs an opportunity to put the machine in order and that they had failed to do so.

There was no proof whatever upon either of these propositions. It is admitted, inferentially at least, that the next harvest had passed.

This action was commenced July 11, 1893, and this court will take judicial notice that in San Joaquin



county the time for harvesting of small grain has arrived on the 11th of July. (*Mahoney v. Aurrecochea*, 51 Cal. 429.) Without some proof sustaining one or the other of these propositions defendant was not entitled to a judgment.

The judgment appealed from should be reversed, and cause remanded for a new trial.

HAYNES, C., and BELCHER, C., concurred.

For the reasons given in the foregoing opinion the judgment appealed from is reversed, and cause remanded for a new trial.

HARRISON, J., GAROUTTE, J., VAN FLEET, J.

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[No. 15959. Department One.—November 13, 1895.]

WILLIAM BOWMAN ET AL., APPELLANTS, v. L. E. WHITE, RESPONDENT.

PRIVATE RAILROAD—NEGLIGENCE—DUTY OF EMPLOYER TO EMPLOYEES—  
DEFECTIVE ROADBED.—The owner of a private railroad, used in connection with lumber business, owes to his employees the duty of keeping the road in good repair after construction; and, if an injury to an employee riding upon the train is proximately caused by reason of a defective roadbed, the employee is entitled to recover for the injury.

ID.—WASHOUT IN ROAD—OBJECT OF TRAIN—CONFLICTING EVIDENCE—  
NONSUIT—QUESTION FOR JURY.—Where an employee upon a construction train is killed by reason of the train running into a washout, and there is conflicting evidence as to whether the construction train, at the time of the accident, was upon the track for the purpose of repairing defects in the road, wherever found, as it passed upon its way, or whether it was bound for a more distant point upon the road, no question of law is raised upon a motion for nonsuit, but rather a pure question of fact, which should be solved by the jury alone, and it is error to grant a nonsuit.

ID.—OBJECT OF TRAIN, WHEN IMMATERIAL—DUTY OF OWNER OF TRACK.  
If the train was bound to an ulterior destination beyond the place where the accident occurred, it is immaterial what its object was in going there, whether for wood or for the purpose of repairing the track, or for some other purpose; for, if it started to such point in the line of its duty, the owner of the road was bound to furnish a safe roadbed and track upon which to travel.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. A. A. SANDERSON, Judge.

The facts are stated in the opinion of the court.

*A. Morgenthal*, for Appellants.

Respondent is under an obligation to its servants to use reasonable care to provide and maintain a safe road-bed. (*Davis v. Central Vermont R. R. Co.*, 55 Vt. 93; 45 Am. Rep. 590; *Stroher v. St. Louis etc. Ry. Co.*, 91 Mo. 509; Shearman and Redfield on Negligence, 4th ed., sec. 406; Patterson on Railway Accident Law, sec. 288; *Trask v. California etc. R. R. Co.*, 63 Cal. 96, 97.) The sudden giving away of a part of the structure is evidence of negligence in its construction. (Shearman and Redfield on Negligence, 4th ed., sec. 411; Patterson on Railway Accident Law, sec. 357; *Stroher v. St. Louis etc. Ry. Co.*, *supra*.) Negligence is a deduction from the facts, and must be made by the triers from the facts, whether jury or court. The court usurped the province of the jury by ordering a nonsuit. (*Chidester v. Consolidated Ditch Co.*, 59 Cal. 201; *McKeever v. Market St. R. R. Co.*, 59 Cal. 300; *McDermott v. San Francisco etc. R. R. Co.*, 68 Cal. 33, 34; Shearman and Redfield on Negligence, sec. 411; *Schierhold v. North Beach R. R. Co.*, 40 Cal. 453; *Jamison v. San Jose etc. R. R. Co.*, 55 Cal. 596; *Wilson v. Southern Pac. R. R. Co.*, 62 Cal. 172; *Noyes v. Southern Pac. R. R. Co.*, 92 Cal. 291; *Begum v. Southern Pac. Co.*, 3 San Francisco Legal News, 382.)

*Oliver P. Evans*, for Respondent.

An employee is not insured by his employer against injury by such accidents, but, on the contrary, they are incident to his employment and he cannot recover. (Civ. Code, sec. 1970; *Congrave v. Southern Pac. R. R. Co.*, 88 Cal. 367; *Daves v. Southern Pac. Co.*, 98 Cal. 19; 35 Am. St. Rep. 133; *Burns v. Sennett*, 99 Cal. 363; *Stevens v. San Francisco etc. R. R. Co.*, 100 Cal. 554.)

GAROUTTE, J.—Respondent, in connection with his lumber business, owned and conducted a railroad running from his mill to the timber, about eight miles distant. Upon Monday morning, December 9th, at 6 o'clock, and while it was yet dark, Victor Bowman, an ordinary laborer, in connection with the engineer, fireman, foreman, and other laborers, started upon a working or construction train over the road. They had proceeded but a few hundred yards when the train ran into a washout some forty feet in length and fourteen feet in depth. Bowman and the engineer were killed, and others of the party injured. This action was brought by representatives of Bowman for damages suffered by reason of his death; and upon the evidence offered by plaintiff a nonsuit was granted. This appeal is prosecuted from the judgment and from the order denying a motion for a new trial.

The facts of the case, as disclosed by the evidence, are quite meager, and, in addition to those already stated, it further appeared that heavy storms of rain had been prevalent for some time; that during the previous week these men with this train had been engaged in repairing the roadbed wherever damaged by the elements; that Saturday evening previous to the accident was the last time the road had been used, the washout therefore necessarily having occurred subsequent to that time. There is also evidence found in the record tending in some degree to show the cause of the washout to be traceable to the breaking of a flume of defendant which was used in carrying water to the mill, and which was situated above and near the roadbed.

The defendant was bound to keep his road in good repair after construction, and this was a duty he owed to his employees as fully and completely as to his passengers if he had been engaged as a common carrier of such; and, if the injury to an employee upon the train is caused by reason of a defective roadbed, that employee is entitled to recover for such injury; for, if the defective roadbed was the direct and proximate

cause of the inquiry, no question of the negligence of fellow-servants is involved.

There is no question of contributory negligence in this case, and the nonsuit was granted and must be sustained, if sustained at all, upon the absence of negligence upon the part of defendant; and the true determination of that question forces us to a consideration of the nature of the work carried on by the construction train in connection with its employees, and particularly as to its mission upon this fatal morning. This is not the proper time to pass upon the weight and character of the evidence, but the record discloses beyond a doubt some evidence to the effect that this train left the mill bound for a point upon the road some four and one-half miles distant, known as Rose Curve. There is also some evidence that the train was bound for that point for the purpose of there repairing the road, and possibly there is some evidence to the effect that it intended to return from that point to the mill with a load of wood. But, whatever its purpose may have been in starting for that point of destination, we think it immaterial. Its object in going there, whether it was for wood, or for the purpose of repairing the track, or for some other cause, in no way affects the question under consideration; for, if it started to that point in the line of its duty, the defendant was bound to furnish it a safe roadbed and track upon which to travel. If not absolutely bound so to do, he was at least required to exercise that degree of care in furnishing a safe roadbed and track demanded by the law. There is some evidence in the record indicating that this construction train, at the time of the accident, was upon the track for the purpose of repairing defects in the road, wherever found, as it passed upon its way; and, if that be the fact, the rule of law applicable to such a case may be found stated in *Vaughan v. California Cent. Ry. Co.*, 83 Cal. 18. But it is sufficient here to say that the evidence does not all point that way, and a conflict therein is clearly apparent. There being such a conflict, no ques-

tion of law was raised, but rather a pure question of fact, which should have been solved by the jury alone.

For the foregoing reasons the judgment and order are reversed and the cause remanded.

HARRISON, J., and VAN FLEET, J., concurred.

[S. F. No. 27. Department One.—November 13, 1895.]

**THE HIBERNIA SAVINGS AND LOAN SOCIETY,  
RESPONDENT, v. ALFRED CLARKE, ET AL., APPEL-  
LANTS.**

**SUMMONS—SERVICE BY PERSON OTHER THAN SHERIFF—CONSTITUTIONAL LAW.**—Section 410 of the Code of Civil Procedure, which authorizes service of summons by a person other than the sheriff, is not in conflict with the general law in regard to the service of process and notices by the sheriff, and is not in violation of section 25 of article IV of the constitution.

**ID.—DUTY OF SHERIFF.**—The code provision defining the duties of a sheriff does not give to or impose upon him exclusively the duty of serving all process and notices, but merely requires of him to serve all notices and process directed to him or placed in his hands for service.

**ID.—REPEAL OF CODE—COUNTY GOVERNMENT ACT—RE-ENACTMENT.**—Section 410 of the Code of Civil Procedure was not repealed by the County Government Act, but was amended and re-enacted in 1893.

**ID.—FILING OF AFFIDAVIT OF SERVICE.**—Where a summons is returned to the office of the clerk with an affidavit of its service attached or annexed thereto, the filing of the summons is sufficient, and it is not necessary that there be a separate filing of the affidavit.

**ID.—DEFAULT—WAIVER OF FINDINGS.**—Defendants who make default and fail to appear at the trial waive findings.

**ID.—SUFFICIENCY OF FINDINGS—RECITALS IN DECREE.**—Recitals in the decree may constitute sufficient findings where findings are required.

**FORECLOSURE OF MORTGAGE—CROSS-COMPLAINT—SERVICE UPON DEFAULTING DEFENDANTS.**—In an action to foreclose a mortgage, where the mortgagor and his wife, who is alleged to have or claim some interest in the mortgaged property, made default, cross-complaints by subsequent lienholders must be served upon the defaulting defendants, and, without such service, the court has no power or authority to grant to the cross-complainants any affirmative relief.

**ID.—OBLIGATIONS OF HUSBAND—ERRONEOUS JUDGMENT AGAINST WIFE.**—Where the note and mortgage which were the basis of the action were executed only by a husband, and a judgment lien pleaded by a cross-complainant was against the husband only, it is error for the court to adjudge that the plaintiff and the cross-complainant respectively recover from both husband and wife the amount of their respective claims.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. WALTER LEVY, Judge.

The facts are stated in the opinion.

*Alfred Clarke*, for Appellants.

Summons should be served by the sheriff. (Pol. Code, sec. 4175; County Government Act of 1883, 1891, 1893, sec. 92; *Lazzarone v. Oishei*, 21 N. Y. Supp. 272; *Moffitt v. McGrath*, 25 Or. 478; Const., art. IV, sec. 25.) The affidavits of service of summons should have been filed. They are improperly in the judgment-roll, and they cannot take effect until filed. (*Connolly v. Ashworth*, 98 Cal. 205-364; *Smith v. County of Los Angeles*, 99 Cal. 628; *Sutton v. Symons*, 100 Cal. 576.)

*Tobin & Tobin*, for Respondent.

BELCHER, C.—The plaintiff brought this action to foreclose a mortgage executed by the defendant Alfred Clarke to secure payment of his promissory note for \$10,200, dated January 11, 1889, and payable to plaintiff, or order, one year after date, with interest.

Johanna F. Clarke and several other persons were made parties defendant, upon the ground that they had or claimed interests in, or liens upon, the mortgaged premises, which interests or liens were alleged to be subsequent and subject to the lien of said mortgage. The defendants Alfred Clarke and Johanna F. Clarke did not appear, and their defaults were entered.

The defendant Samuel G. Murphy answered and filed a cross-complaint, setting up that he held a deed of a part of the said mortgaged premises, and of other land, which was executed to him in June, 1891, by the defendants Clarke, and which was absolute in form, but was intended as a mortgage to secure payment of two promissory notes, made by defendant Alfred Clarke, for \$3,000 each, with interest, and praying that the said

deed be adjudged to be a mortgage to secure payment of said notes, etc.

The defendant the Gray Brothers Artificial Stone Paving Company answered, setting up that it had recovered a judgment in the superior court, in and for the city and county of San Francisco, against the defendant Alfred Clarke, for the sum of \$986, and \$93.30 costs of suit, which judgment was still in full force and effect, and was a lien on the mortgaged premises superior to the plaintiff's mortgage and the claim of defendant Murphy.

The defendant E. J. Wilson answered, setting up that he held a grant, bargain, and sale deed of a part of the said mortgaged premises, and of other lands, which was executed to him in September, 1891, by defendant Alfred Clarke, in trust to secure payment of a promissory note for \$12,000 and interest, made by said Clarke, on which there was still due and unpaid the sum of \$10,450, with a prayer for proper relief.

The cause came on regularly for trial on August 29, 1894, upon the pleadings of the respective parties, and a decree of foreclosure was entered on November 17, 1894.

The decree recites that "findings having been duly waived herein, and the court having heard the proofs of the respective parties and the evidence produced in support thereof, and having considered the same, and it appearing to the satisfaction of the court": 1. That the defendants Alfred Clarke and Johanna F. Clarke were duly served with summons, together with a copy of the complaint, and that the defaults of said defendants for not appearing and answering were duly entered on August 11, 1894; 2. That the separate answer and cross-complaint of the defendant Samuel G. Murphy was duly and personally served upon the defendants Alfred Clarke and Johanna F. Clarke; 3. That there is due and owing to the plaintiff from the defendants Alfred Clarke and Johanna F. Clarke, upon the note and mortgage mentioned and set forth in the complaint, the

sum of \$11,426.43; that all the allegations of the complaint are true; and that \$350 is a reasonable amount to be allowed plaintiff as counsel fee in the action; 4. That there is now due and owing the defendant Murphy, upon the notes mentioned and set forth in his answer and cross-complaint, the sum of \$7,280; and that the deed therein set forth was intended as a mortgage to secure the payment of the moneys due and to grow due upon said notes; 5. That there is now due and owing to the defendant the Gray Brothers Artificial Stone Paving Company, under a judgment set forth in its answer, the sum of \$986 principal, \$120.75 interest and \$13 costs; 6. That there is due and owing upon the note set out in the answer of E. J. Wilson, secured by a trust deed to said Wilson, described in his answer, a certain sum in United States gold coin, the amount of which is to be subsequently determined by the court in case any money shall remain applicable to said trust after satisfying the prior liens of the plaintiff and said Murphy.

It is then adjudged that the plaintiff recover from the defendants Alfred Clarke and Johanna F. Clarke the sum of \$11,426, with legal interest and counsel fees as aforesaid; that the defendant Murphy recover from the defendant Alfred Clarke the sum of \$7,280 with interest; that the defendant the Gray Brothers Artificial Stone Paving Company recover from the defendants Alfred Clarke and Johanna F. Clarke the sum of \$1,106.75, with interest, and \$13 costs; that the defendant E. J. Wilson is entitled to recover, as trustee, from the defendant Alfred Clarke, under the note and trust deed set forth in his answer, the amount due, etc.; and that all of the real property described in the complaint of plaintiff, and in the answer and cross-complaint of defendant Murphy, be sold as by law provided, and the proceeds of the sales applied in a manner specified.

In January, 1895, in pursuance of previous notice, the defendants Clarke moved the court to vacate and set aside the judgment and decree entered in the action,



upon the grounds: That no summons was served on either of said defendants by any person authorized or qualified to serve the same, and there was no appearance by either of them, and hence the court never acquired jurisdiction of their persons; that no findings were filed, and findings were not waived by said defendants, or either of them; that the pleading of the defendant the Gray Brothers Artificial Stone Paving Company and the pleading of the defendant E. J. Wilson were not served on said defendants, or either of them, and the trial was had in the absence of, and without notice to, said defendants.

The motion was made upon the judgment-roll, and the affidavits served and filed with the notice. The court denied the motion, and the defendants Clarke appeal from the order denying the same, and from the judgment and decree of foreclosure.

1. The affidavit of service shows a sufficient service of the summons, if such service could be made by a person other than the sheriff, as provided by section 410 of the Code of Civil Procedure. It is objected, however, that under the general law declared in section 4176 of the Political Code, and in the County Government act, "the sheriff must . . . serve all process and notices in the manner prescribed by law," and that service can be made by no other person; that section 410 of the Code of Civil Procedure, in so far as it authorizes service by a person other than the sheriff, is a special law, in conflict with the general law, and the passage of which was inhibited by section 25 of article IV of the constitution, and hence the attempted service thereunder on appellants was insufficient to give the court jurisdiction of their persons.

Without following the very elaborate argument of counsel on this point, it is enough to say that the same point was made in reference to the service of an injunction, and held untenable, in *Golden Gate etc. Co. v. Superior Court*, 65 Cal. 190. In that case the court, referring to the language above quoted from the Political

Code, said: "The section is found in the chapter defining the duties of sheriff, and does not give to, or impose upon, him exclusively the duty of serving all process and notices, but requires of him to serve all process and notices directed to him, or placed in his hands for service, which the law commands him to serve when addressed or handed to him."

Section 410 of the Code of Civil Procedure was not repealed by the County Government Act, as claimed, but was amended and re-enacted in 1893. (Stats. 1893, p. 207.)

It is further objected that the affidavit of service was never filed, and that it was improperly included in the judgment-roll. But the statute did not require the affidavit to be filed. It required only that the summons be returned to the office of the clerk from which it issued, with an affidavit of its service. (Code Civ. Proc., sec. 410.) The summons was returned and filed, and the affidavit, as it states, was "annexed" thereto. This was sufficient.

2. The objection that no findings were filed and that findings were not waived by appellants is clearly untenable. When they suffered their defaults to be entered and failed to appear at the trial they waived findings. (Code Civ. Proc., sec. 634.) Besides, the recitals in the decree constitute sufficient findings, if findings were required.

3. The objection to the judgment and decree, in so far as it is in favor of the Gray Brothers Artificial Stone Paving Company and of E. J. Wilson, must be sustained. The court found that the answer and cross-complaint of Murphy was served on appellants, but there is no finding, and nothing in the record to show, that the pleadings of the paving company and Wilson were ever so served. And the uncontradicted affidavits of appellants, which were filed and used on the hearing of their motion, state positively that the said pleadings were not served on either of them. But without such service the court had no power or authority to grant the

said cross-complainants any affirmative relief. (*Hibernia etc. Soc. v. Fella*, 54 Cal. 598.)

4. The note and mortgage which were the basis of plaintiff's action were executed only by Alfred Clarke. It was clearly error, therefore, for the court to find that there was due and owing to the plaintiff "from the defendants Alfred Clarke and Johanna F. Clarke," upon the said note and mortgage, the sum stated, and to adjudge that plaintiff "recover from the defendants Alfred Clarke and Johanna F. Clarke" the said sum.

So the judgment pleaded by the Gray Brothers Artificial Stone Paving Company was against Alfred Clarke only, and it was error, therefore, for the court to adjudge that that company "recover from the defendants Alfred Clarke and Johanna F. Clarke" the amount of said judgment.

For the errors above noted the judgment and decree should be reversed and the cause remanded for further proceedings.

HAYNES, C., and BRITT, C., concurred.

For the reasons given in the foregoing opinion the judgment and decree are reversed and the cause remanded for further proceedings.

HARRISON, J., GAROUTTE, J., VAN FLEET, J.

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[No. 18456. Department Two.—November 13, 1895.]

IN THE MATTER OF THE INSOLVENCY OF J. A. PATTON.

INSOLVENCY—PETITION OF CREDITORS—SUFFICIENCY OF PLEADING—FRAUDULENT TRANSFER.—Under section 8 of the Insolvent Act, which prescribes what facts the petition of creditors against an insolvent debtor shall set forth, a petition alleging a transfer of the property of the insolvent with intent to hinder, delay, and defraud his creditors, and setting forth the name of the grantee, with the circumstances of time, place, and general description of the property sold, is sufficient, and is not demurrable because the allegations of fraud are not made more specific; and where the

petition also alleges that the respondent, being insolvent, and in contemplation of insolvency, sold and conveyed a stock of merchandise, in the petition described, it sufficiently states an act of insolvency on the part of the respondent, entitling the creditors to an adjudication of his insolvency.

**APPEAL** from a judgment of the Superior Court of Glenn County. **SETH MILLINGTON**, Judge.

The facts are stated in the opinion.

*Joseph Kirk*, and *J. H. Ball*, for Appellant.

The complaint stated all the requirements and jurisdictional facts enumerated in section 8 of the Insolvent Act, and the demurrer should not have been sustained. (*Campbell v. Judd*, 7 West Coast Rep. 372; *In re Denery*, 89 Cal. 101; *Threlkel v. Scott* (Cal., Nov. 25, 1893), 34 Pac. Rep. 851; *Bump's Practice in Bankruptcy*, 9th ed., 533, form 54.)

*Charles I. Donohoe*, for Respondent.

The petition does not sufficiently and specifically state the facts constituting the fraud. (*Kinder v. Macy*, 7 Cal. 206; *Harris v. Taylor*, 15 Cal. 348; *Meeker v. Harris*, 19 Cal. 279; 79 Am. Dec. 215; *Castle v. Bader*, 23 Cal. 77; *Kent v. Snyder*, 30 Cal. 674; *Mandeville v. Solomon*, 39 Cal. 125; *Sacramento Sav. Bank v. Hynes*, 50 Cal. 196; *Bull v. Bray*, 89 Cal. 286; *Dyer v. Bradley*, 89 Cal. 557.)

**VANCLIEF, C.**—The requisite number of the creditors of **J. A. Patton** petitioned the superior court of Glenn county that he be adjudged insolvent and required to surrender his estate for the benefit of his creditors, and he was ordered to show cause why the petition should not be granted. In response to the order he demurred to the petition, on the grounds that it "does not state facts sufficient to constitute an act of insolvency on the part of said respondent, and does not state facts sufficient to constitute a cause of action against respondent."

The court sustained the demurrer, and the petitioners

declining to amend their petition, judgment passed for defendant dismissing the petition, and for costs.

The petitioners bring this appeal upon the judgment-roll.

The petition states two grounds, or acts of the respondent, upon which the petitioners pray that he may be adjudged insolvent, as follows:

1. "That said J. A. Patton did heretofore, to wit, on or about the 20th day of July, 1894, at the town of Willows, county of Glenn, state of California, make a transfer of his property, with intent to hinder, delay, and defraud his creditors; that is to say, being then and there possessed of a stock of merchandise, consisting of dry goods, fancy goods and furnishing goods, boots and shoes, clothing, hats and caps, groceries and tobacco, and similar goods, contained in his store conducted by him at said town of Willows, being indebted to the petitioners herein, the said respondent, J. A. Patton, did transfer said stock of merchandise and property unto one R. D. Fry, with the intent aforesaid.

"That said J. A. Patton was, and at all the times herein mentioned, and now is, insolvent, and has not sufficient property with which to satisfy the claims and demands of petitioners."

2. "That said respondent, on or about the 20th day of July, 1894, at the town of Willows, county of Glenn, state aforesaid, being insolvent and in contemplation of insolvency, did make a grant, sale, conveyance, and transfer of a certain stock of merchandise, consisting of dry goods, fancy goods, and furnishing goods, boots and shoes, clothing, hats and caps, groceries and tobacco, and similar goods, then and there belonging to and used in the business conducted by him at said Willows, unto one R. D. Fry.

"That said respondent, J. A. Patton, was at all the times herein mentioned, and now is, insolvent, and has not sufficient property with which to satisfy the claims and demands of petitioners."

The only deficiency attributed to the petition by re-

spondent is "that the allegations of fraud, as set out in the creditor's petition, merely state conclusions of law, and are not sufficiently specific as to the facts and circumstances constituting the fraud."

Section 8 of the Insolvent Act of 1880 prescribes what the creditors' petition must set forth as acts for which a person may be adjudged insolvent. Among them are the following: That he "has made any assignment, gift, sale, conveyance, or transfer of his estate, property, rights, or credits with intent to delay, defraud, or hinder his creditors; or, in contemplation of insolvency, has made any payment, gift, grant, sale, conveyance, or transfer of his estate, property, rights, or credits."

That the respondent did make a transfer of his property to one R. D. Fry, with intent to hinder, delay, and defraud his creditors, and that, in contemplation of insolvency, he did make a grant, sale, conveyance, and transfer of his property to said Fry, are specifically stated in the petition, with the circumstances of time, place and general description of the property sold. This was in full compliance with section 8 of the Insolvent Act, which prescribes what the petition must set forth. It is also entirely in accord with the practice in bankruptcy cases in the federal courts under the United States bankrupt law, substantially the same as section 8 of the Insolvent Act of this state. (See Bump's Practice in Bankruptcy, 933, form 54.) No authority applicable to insolvency or bankruptcy cases has been cited by counsel for respondent which would sustain the demurrer in this case, the cases cited being only the ordinary actions in which relief is sought on the ground of fraud actually committed, and in which the pleading is governed by the general law of pleading, and not by a statute enacted for a special class of cases which prescribes what facts the pleading shall set forth, as does the eighth section of the Insolvent Act. Besides, no fraud is necessary to constitute a majority of the acts enumerated in section 8 of the Insolvent Act, for which a person may be adjudged an insolvent; and, at least,

one of such acts is charged in the petition under consideration, viz., that, "in contemplation of insolvency," the respondent sold and conveyed his property, etc. Each of the acts enumerated in said section, as well as the intention with which it was done, is a fact, and not a conclusion of law, as contended by counsel of respondent. Surely the selling of one's property with the intent to delay creditors is a fact upon proof of which the seller may be adjudged an insolvent, and the petition sufficiently states this fact.

I think the judgment should be reversed and the court below instructed to overrule the demurrer.

BELCHER, C., and BRITT, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed and the court below is instructed to overrule the demurrer.

McFARLAND, J., HENSHAW, J., TEMPLE, J.

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[No. 18444. Department Two.—November 13, 1895.]

GEORGE T. HENIGAN, RESPONDENT, v. H. ERVIN,  
APPELLANT.

**APPEAL—TEST OF JURISDICTION—JUSTICE'S COURT—SUM DEMANDED—COSTS EXCEEDING THREE HUNDRED DOLLARS—DISMISSAL.**—Where the demanded sum is less than three hundred dollars, the jurisdiction of the justice's court and also the appellate jurisdiction of the supreme court must be tested by the sum demanded in the complaint, and the costs of the action in the justice's court and in the superior court, upon appeal therefrom, are merely incidental to the action, and cannot be made the subject of an appeal to the supreme court, although the costs allowed may amount to more than the sum of three hundred dollars, and an appeal therefrom must be dismissed.

**Id.—NONAPPEALABLE ORDER—SPECIAL ORDER AFTER JUDGMENT—APPEAL FROM JUSTICE'S COURT.**—A special order after judgment refusing to strike out a cost bill in the superior court, in a case appealed from the justice's court, is not appealable to the supreme court, although the cost bill amounts to over three hundred dollars.

APPEAL from a judgment of the Superior Court of Yolo County, and from an order allowing costs in excess of three hundred dollars, in a case appealed to said Superior Court from the Justice's Court of Woodland Township, Yolo County. W. H. GRANT, Judge.

The facts are stated in the opinion.

*F. E. Baker and E. R. Bush, for Appellant.*

A motion to strike out a cost bill may be reviewed in this court upon appeal. (*Empire Co. v. Bonanza Co.*, 67 Cal. 411; *Yorba v. Dobner*, 90 Cal. 338; *Schallert-Ganahl etc. Co. v. Neal*, 94 Cal. 194; *Crane v. Forth*, 95 Cal. 88, 92.) Under the proper rules of construction section 1033 of the Code of Civil Procedure is applicable to justices' courts. (*Ex parte Latimer*, 47 Cal. 131.)

*R. Clark, and C. W. Thomas, for Respondent.*

The appeal should be dismissed. (*Lasky v. Davis*, 33 Cal. 677; *Flubacher v. Kelly*, 49 Cal. 116; Code Civ. Proc., secs. 963, 964.)

VANCLIEF, C.—This action was commenced in the court of a justice of the peace to recover the sum of \$222.20 for cordwood alleged to have been sold and delivered by plaintiff to defendant. The judgment of the justice of the peace was in favor of the plaintiff for the sum of \$169.95 and for costs amounting to \$180.70. The defendant appealed from the judgment to the superior court "on question of both law and fact."

A jury trial *de novo* was had in the superior court, which resulted in a verdict in favor of plaintiff for the sum of \$22.20. Within the time limited by law, and before judgment was entered on the verdict, the plaintiff filed an itemized cost bill amounting to \$358.70, including the costs taxed in the justice's court. On the day of the filing of this cost bill the defendant gave notice that on a stated future day he would move the court "to strike out the costs claimed to have accrued in the justice's court, on the ground that plaintiff is not



entitled to recover his alleged costs in said justice's court, for the reasons that no verified memorandum" of such costs "was served on defendant or filed in said justice's court; and also to strike out the items of costs alleged to have accrued in the superior court, on the grounds that the plaintiff is not entitled to costs therein." And further gave notice that, in case the court determined that plaintiff was entitled to costs, he would move the court to tax the costs, "on the grounds that the costs claimed by plaintiff are erroneous, and that the disbursements claimed had not been made by plaintiff, and that plaintiff's memorandum contained items of disbursements which are not legal charges as costs in this action." But no objection to any item of the cost bill is specified except as above stated. In the mean time, and before the questions as to costs were determined, judgment was entered on and in accordance with the verdict of the jury, reserving the matter of costs until after defendant's motions relating to that matter should be disposed of. Afterward defendant's motions relating to costs were heard and denied by the court, and the full amount of plaintiff's cost bill (\$358.70) was allowed and inserted in the judgment, to which defendant excepted.

The defendant appeals from the judgment as at first entered before his motions relating to costs were heard or denied, and also "from an order and judgment of said superior court . . . allowing and adjudging that plaintiff recover of and from said defendant costs in said action amounting to the sum of \$350.70." The appeals are on the judgment-roll containing a bill of exceptions showing, substantially, the facts above stated.

The respondent moves to dismiss the appeals on the ground that this court has no appellate jurisdiction of the subject matter of the cause, and I think the motion should be granted.

The appellate jurisdiction of this court is defined by section 4, article VI, of the constitution of this state; and it has no appellate jurisdiction except such as is

given by that instrument. Where the demand in suit is merely for money, as in this case, the supreme court has no appellate jurisdiction, unless such demand, exclusive of interest, amounts to \$300. In this case the demand sued for is simply for money, and amounts to only \$222.20. For the purpose of testing either the original jurisdiction of the justice of the peace, or the appellate jurisdiction of the supreme court, the incidental costs of the plaintiff can no more be deemed a part of the demand than can the interest on the sum of money or value of the property sued for. (*Dumphy v. Guindon*, 13 Cal. 30; *Maxfield v. Johnson*, 30 Cal. 545.) As generally applicable to the question of the appellate jurisdiction of the supreme court, see *Maxfield v. Johnson*, *supra*; *Gorton v. Ferdinando*, 64 Cal. 11; *Williams v. Macartney*, 69 Cal. 556. It has often been held by this court that where jurisdiction depends on the amount in controversy, the *ad damnum* clause or the sum demanded in the complaint is the sole test. (*Dashiell v. Slingerland*, 60 Cal. 653; *Lord v. Goldberg*, 81 Cal. 599; *Bailey v. Sloan*, 65 Cal. 387; *Solomon v. Reese*, 34 Cal. 28.)

It is claimed by appellant that the order denying his motion to strike out plaintiff's cost bill was a "special order made after final judgment," in the sense of subdivision 2 of section 963 of the Code of Civil Procedure, and therefore is an appealable order. But the next following section (964) provides that "the foregoing section (963) does not apply in cases appealed from justices' . . . courts, except cases of forcible entry and detainer, and cases involving the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand, exclusive of interest or value of the property in controversy, amounts to three hundred dollars." The cases cited to this point are cases of which the superior courts, or late district courts, had unquestionable *original* jurisdiction, and consequently cases of which the supreme court had appellate jurisdiction; and, therefore, are not applicable to this case.

I think the appeals from the judgment and order should be dismissed.

HAYNES, C., and SEARLS, C., concurred.

For the reasons stated in the foregoing opinion the appeals from the judgment and order of the superior court are dismissed.

McFARLAND, J., HENSHAW, J., TEMPLE, J.

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[Crim. No. 35. Department Two.—November 13, 1895.]

THE PEOPLE, RESPONDENT, v. S. J. THOMAS,  
APPELLANT.

**CRIMINAL LAW — BURGLARY — PRIOR CONVICTION — PLEA—EVIDENCE—**  
**ADMISSIONS OF DEFENDANT.**—Where a defendant, accused of burglary and of a prior conviction of burglary, pleads guilty to the prior conviction, and not guilty as to the offense charged, it is the intent of the code, in such case, to keep all information from the jury as to the previous conviction; and the plea of guilty thereof is only intended for the information of the court in determining the punishment to be imposed in case of conviction; and it is prejudicial error to admit evidence of declarations of the defendant that he had served a term in the state's prison under the prior conviction.

APPEAL from a judgment of the Superior Court of Alameda County and from an order denying a new trial.  
JOHN ELLSWORTH, Judge.

The facts are stated in the opinion of the court.

W. F. Sullivan, and I. F. Chapman, for Appellant.

It was error to permit evidence of the declarations of the defendant that he had been convicted of a felony, he not having been sworn as a witness, and the evidence of another offense by his declarations was immaterial, irrelevant, and incompetent. (*People v. Cunningham*, 66 Cal. 671; *Commonwealth v. Keyes*, 11 Gray, 323; *Commonwealth v. Campbell*, 155 Mass. 537.)

*W. F. Fitzgerald, Attorney General, and Charles H. Jackson, Deputy Attorney General, for Respondent.*

The admissions of the defendant, though not sufficient to base a conviction upon, were admissible for what they were worth. (*People v. Thrall*, 50 Cal. 415; *People v. Jones*, 31 Cal. 565; *People v. Hennessey*, 15 Wend. 147; *People v. Badgley*, 16 Wend. 53; *State v. Guild*, 10 N. J. L. 163; 18 Am. Dec. 404; *People v. Ruloff*, 3 Park. C. C. 401; *Mayor of New York v. Walker*, 4 E. D. Smith, 258.)

HAYNES, C.—The defendant was convicted of burglary in the first degree and sentenced to imprisonment at San Quentin for twenty-five years, and this appeal is from an order denying his motion for a new trial. The information charged a burglary committed at the county of Alameda in October, 1894, and also charged a prior conviction of the crime of burglary in the superior court of said county on October 15, 1890.

Upon arraignment the defendant confessed the prior conviction, and, as to the offense charged in the information, pleaded not guilty. Upon the trial a witness called on the part of the prosecution was permitted, over the objection of defendant, to testify to the following conversation which he had with the defendant after his arrest and while the witness had him in custody, namely: "I says to the defendant, Ain't it a fact that you served two years in San Quentin, from Alameda county, for burglary? He said: No, I served two years in Folsom for burglary." The ruling of the court was duly excepted to, and is the only error relied upon.

Section 1158 of the Penal Code provides that the jury, if they find a verdict of guilty of the offense with which the defendant is charged, "must also, unless the answer of the defendant admits the charge, find whether or not he has suffered such previous conviction."

Subdivision 1 of section 1093 of the Penal Code is as follows: "If the indictment or information be for felony, the clerk must read it, and state the plea of the defendant to the jury; and, in cases where it charges a

previous conviction, and the defendant has confessed the same, the clerk, in reading it, shall omit therefrom all that relates to such previous conviction."

From these provisions it is clear that if, upon arraignment, the defendant denies the prior conviction alleged in the indictment or information, that issue, as well as the issue raised by his plea of not guilty of the principal charge, must be submitted to the jury; but if, upon the arraignment, the defendant admits the previous conviction, all information touching a prior conviction must be withheld from the jury. The object had in view in charging a previous conviction is not for the purpose of evidence as to the commission of the offense upon which the defendant is to be tried, but for the information of the court in determining the punishment to be imposed in case of conviction, as is clearly shown by sections 666 and 667 of the Penal Code.

The record here does not disclose upon its face whether the clerk, in reading the information to the jury, read that part relating to the prior conviction. It must be assumed, therefore, that he complied with the provision in section 1093, which requires him, in reading the indictment to the jury, to omit therefrom all that relates to such previous conviction, and that, therefore, the jury were not informed of the prior conviction, otherwise than from the testimony of said witness. If the clerk had read that portion of the information to the jury, it would have been error requiring a reversal of the judgment (*People v. Sansome*, 84 Cal. 449), and no such error will be presumed.

In *People v. Sansome*, *supra*, the defendant objected to the reading of that part of the indictment which charged a prior conviction, and to the statement of his plea thereto. The court overruled the objection, and the clerk stated "that to the said charge of prior conviction that the defendant confessed the same, and he was guilty." This court there held that the ruling of the court was clearly erroneous, and said, among other things, that "the evident purpose of the provision of

the code above quoted was to keep from the jurors all knowledge that the person on trial before them had been previously convicted of a criminal offense. And this is based upon the well-settled and familiar principles of law and right."

In *People v. Wheatley*, 88 Cal. 117, it was said: "He may plead simply not guilty, and thus put in issue every material allegation of the indictment or information; or he may plead not guilty of the principal offense charged, and confess the previous conviction. If he confesses the previous conviction, then the clerk, in reading the indictment or information to the jury, must omit therefrom all that relates to such previous convictions, and no testimony in regard to them can be offered or reference to them be made during the trial."

In the case at bar, the defendant having, upon arraignment, confessed the prior conviction, or pleaded guilty thereto, there was no issue as to the prior conviction to which the testimony was applicable. It was not an admission that he had committed the offense upon which he was being tried, and was wholly inadmissible as evidence tending to prove the commission of that offense, while it thwarted the very purpose of the code provision which requires the clerk to omit all that relates to the prior conviction when he reads the information to the jury. The admission of the evidence objected to was not only erroneous, but highly prejudicial to the defendant.

The judgment and order should be reversed and a new trial granted.

SEARLS, C., and VANCLIEF, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are reversed and a new trial granted.

McFARLAND, J., HENSHAW, J., TEMPLE, J.

[S. F. No. 135. In Bank.—November 13, 1895.]

**JAMES F. COSBY, PETITIONER, v. SUPERIOR COURT  
OF LOS ANGELES COUNTY, RESPONDENT.**

**TRUST—LIMITATION OF TIME IN DECREE OF ENFORCEMENT—CESSATION OF RIGHT.**—In an action to enforce a trust and to compel a conveyance, the court may fix a limitation in the decree of enforcement, within which money must be paid or tendered as a condition of the conveyance, and may provide that, in default of payment or tender made on or before a day fixed in the decree, all the right, title, and interest of the plaintiff shall cease and be at an end, and that thereafter neither of the defendants shall be held as a trustee in respect to any of the matters mentioned in the decree, and the parties may be concluded by such limitation.

**ID.—SUBSEQUENT ORAL MODIFICATION—POWER OF COURT—CONTEMPT.**—It is doubtful whether the court has power, at a date subsequent to the time fixed by its decree, to make a material modification and change in the terms of a decree fixing a time for a payment or tender, after which the rights of the plaintiffs are to cease, if no payment or tender is made, by extending the time for a tender after the plaintiffs have forfeited their rights under the decree by its original terms; but where such attempted modification of the decree was merely announced orally from the bench, and not entered of record, the court has no jurisdiction, upon a subsequent tender by the plaintiff and refusal of the defendants to make a conveyance, to punish the defendants for contempt of court for such refusal.

**ID.—CRIMINAL OFFENSE—CONSTRUCTIVE CONTEMPT—ORDER NOT OF RECORD.**—Contempt of court is a specific criminal offense, and a party cannot be held guilty of constructive contempt for refusing to comply with a mere verbal announcement of a direction or order having no existence of record.

**ID.—DECREES OF COURT—REQUIREMENT OF WRITING—RECORD—ORAL MODIFICATION.**—Decrees of court are required to be in writing and remain of record, and those affected thereby have a right to stand by such record, and, unless a change is made in the record, and knowledge brought home to the party sought to be charged thereby, he has a right to regard the decree as entered as the final direction of the court, and to disregard any oral modification thereof having only a mere potential existence.

**ID.—NUNC PRO TUNC ORDER—JURISDICTION.**—The court cannot acquire jurisdiction to punish a defendant for contempt by entering a *nunc pro tunc* order modifying the decree at the hearing of an order to show cause why the defendant should not be punished for contempt, so as to make the record conform to a prior verbal order not previously entered of record.

**ID.—JUDGMENT FOR CONTEMPT—WRIT OF PROHIBITION.**—There is no appeal from a judgment of contempt, and where such judgment, although entered, has not yet been fully carried out or executed, a writ of prohibition will lie to prevent further proceedings of the court in the matter of the contempt.

APPLICATION in the Supreme Court for a writ of prohibition to the Superior Court of Los Angeles County. J. W. MCKINLEY, Judge.

The facts are stated in the opinion of the court.

*John D. Pope*, for Petitioner.

As long as anything remains to be done under the order or judgment, the writ of prohibition is appropriate, not only to arrest further proceedings, but to annul what has already been done under the order or judgment. (*Havemeyer v. Superior Court*, 84 Cal. 329, 389; 18 Am. St. Rep. 192. See, also, *Ex parte Gordon*, 92 Cal. 478, 481; 27 Am. St. Rep. 154.) Unauthorized conditions accompanying a tender render it of no avail. (Civ. Code, sec. 1494; *Woody v. Bennett*, 88 Cal. 241; *Jones v. Shuey* (Cal., April 3, 1895), 40 Pac. Rep. 17; Civ. Code, secs. 1494, 1499, 1501; Code Civ. Proc., sec. 2076.) The order made upon the minute-book, on April 2, 1895, as of date August 1, 1893, by which it was proposed to give to the Kofoeds until August 3, 1893, to make payment, was without jurisdiction, and was utterly null and void, because nothing appeared upon the records in the action to show any error or omission, and the judgment requiring payment to be made by the thirty-first day of July, 1893, could not be amended by a mere minute order, even if the court possessed jurisdiction to make an amendment. (*Swain v. Naglee*, 19 Cal. 127; *De Castro v. Richardson*, 25 Cal. 49; *Hegeler v. Henckell*, 27 Cal. 492; *Estate of Schroeder*, 46 Cal. 305, 316; *Dreyfuss v. Tompkins*, 67 Cal. 339; *Wiggin v. Superior Court*, 68 Cal. 401; *Carpenter v. Superior Court*, 75 Cal. 596; *Fallon v. Brittan*, 84 Cal. 511; *Lang v. Superior Court*, 71 Cal. 491; *Egan v. Egan*, 90 Cal. 15.) Where the judgment declares time to be essential, the payment must be made within the time limited. (*Clark v. Hall*, 7 Paige, 382; *Keller v. Lewis*, 53 Cal. 113; *Barsolou v. Newton*, 63 Cal. 223; *Bremer v. Calumet etc. Canal Co.*, 127 Ill. 464; *Burgess v. Ruggles*, 146 Ill. 506; *Hansbrough v. Peck*, 5 Wall. 497, 506.)



*George R. Du Bois, Bicknell & Trask, and T. M. Stewart, for Respondent.*

Mere overstepping of its authority by the court in a portion of its judgment, or any other error in its proceedings, is not ground for prohibition. (*Ex parte Pennsylvania*, 109 U. S. 174; *People v. Court*, 43 Barb. 278; *High on Extraordinary Legal Remedies*, 768; *State v. Superior Court*, 3 Wash. 705; *Ex parte Ferry Co.*, 104 U. S. 519.) The court has jurisdiction to make a *nunc pro tunc* amendment to make the minutes show what the court actually did. (*Niles v. Edwards*, 95 Cal. 47; *Von Schmidt v. Widber*, 99 Cal. 515; *In re Wight*, 134 U. S. 136; *Conklin v. Elevated R. R. Co.*, 13 N. Y. Supp. 782.) A writ of prohibition never issues to review what has already been done, nor to prevent the doing of an act which is not threatened to be done. (*Coker v. Superior Court*, 58 Cal. 178; *Hull v. Superior Court*, 63 Cal. 179; *Havemeyer v. Superior Court*, 84 Cal. 390; 18 Am. St. Rep. 192; *More v. Superior Court*, 64 Cal. 346.)

VAN FLEET, J.—Application for prohibition to prevent respondent from proceeding to enforce against petitioner a judgment convicting him of contempt for refusal to comply with a decree of said court.

The material facts appearing from the very voluminous petition and answer may be briefly stated thus: John C. Kofoed and Lillie H. Kofoed brought an action in said superior court against the petitioner, Cosby, and one Samuel B. Gordon, alleging that said Gordon, while employed and acting as their attorney, for the purpose, among others, of procuring the settlement and satisfaction of a certain judgment held by said Cosby against the Kofoeds, entered into a contract with Cosby, without the knowledge of the Kofoeds, whereby it was agreed that for a consideration of two hundred dollars, to be paid Cosby by Gordon, Cosby should assign said judgment to Gordon for the latter's own benefit; that under this agreement Cosby retained the title to the judgment in his own name, and, at the direction of Gordon, pro-

cured an execution to be issued thereunder, and levied upon certain real estate of the Kofoeds, which was sold thereunder and the title bought in by Cosby, to be held by him for Gordon until the latter should pay the said consideration of two hundred dollars. And they prayed that Gordon be held their trustee as to all rights acquired by him under said agreement.

As a result of the trial of said action, a decree was entered in said court, by which it was adjudged that Gordon held whatever rights he had acquired under his contract with Cosby for the benefit of the Kofoeds, and that the latter should be held subrogated to all the rights of Gordon thereunder, provided they should pay or tender to Gordon, on or before the thirty-first day of July, 1893, the sum of seventy-nine dollars and fifty cents, paid out by Gordon in the transaction; and further directed that, upon the payment or tender by the Kofoeds to Cosby of said consideration of two hundred dollars, agreed to be paid him by Gordon, Cosby should receive the same in full satisfaction of said judgment so assigned by him to Gordon, and should convey to the Kofoeds the real property bought in by him at said execution sale. The decree expressly provided "that, unless the plaintiff shall pay or tender said sum to the said James F. Cosby, and shall also pay to the said Gordon the sums hereinbefore mentioned as payable to him, on or before the thirty-first day of July, 1893, all the right, title, and interest of plaintiffs, or either of them, in and to the said contract and premises hereinbefore mentioned shall cease and be at an end, and thereupon and thereafter neither the said Gordon nor the said Cosby shall be held as trustee for plaintiffs, or either of them, with respect to any of the matters mentioned in this decree."

Intermediate the entry of said decree, which was on July 17, 1893, and the thirty-first day of July, 1893, the Kofoeds made an absolute transfer and assignment of their rights and interest under said decree to one Bradshaw. On the last-named date Bradshaw tendered to, and offered to pay, Gordon and Cosby the amounts re-

spectively required by the decree, but coupled with such tender the condition that Cosby and Gordon execute a conveyance which in its terms was not in accord with the directions and requirements of said decree, and by reason of this condition said tender was refused. Thereupon, on the same date, Bradshaw procured from said court a citation against Gordon and Cosby to show cause on the next day, August 1st, why they should not be held guilty of contempt for disobedience of said decree. A hearing on said citation was accordingly had, but Gordon and Cosby were held not guilty of contempt in the premises, and the rule was discharged. Thereafter, on August 2, 1893, the Kofoeds, who had on August 1st received a reassignment from Bradshaw of their rights under the decree, themselves made a tender, which it seems to be conceded was, except as to the matter of time, in conformity with the decree. This tender was, however, refused, upon the ground that it came too late, and that the rights of the Kofoeds, under the terms of the decree, were forfeited and lost. About this time Cosby and Gordon took an appeal from said decree to this court, but it does not appear that such appeal was so perfected as to stay proceedings under the decree, and subsequently the appeal was voluntarily dismissed.

No further steps appear to have been taken by the Kofoeds in the matter until on or about the twenty-fifth day of January, 1895, when they caused a notice in writing to be served upon Cosby and Gordon of their readiness, and renewing their offer to pay the amounts required by the decree, with interests, etc., upon the execution of the required instruments of conveyance. This offer being likewise refused, upon the ground that it came too late, the Kofoeds sued out a second citation against Cosby and Gordon, requiring them to show cause before said superior court on the second day of April, 1895, why they should not be punished for contempt in refusing to comply with said decree. Up to this time the decree had remained of record as originally

entered, requiring the payment or tender of the amounts specified therein to be made on or before July 31, 1893, in default of which the rights of the Kofoeds thereunder should be held forfeited, and there was nothing of any character appearing upon the records of said court to indicate or publish the fact that any change or modification in its terms had ever been had or attempted therein. Upon the hearing of said last-mentioned citation, however, there was evidence offered and received by the court, on behalf of the Kofoeds, tending to show that at the hearing of the first citation for contempt, above noted, had on August 1, 1893, the judge of said court had announced orally from the bench that he would grant the Kofoeds three days further time from said thirty-first day of July, named in the decree, within which to make a further tender, but that the clerk had failed to make any note of such suggestion or order. This evidence was controverted by evidence on behalf of Cosby and Gordon tending to show that no such order or suggestion had been made, and that, if made, that the latter never had or received any knowledge thereof; but the court, on said April 2, 1895, directed its clerk to enter an order *nunc pro tunc* as of August 1, 1893, granting to said Kofoeds such extension of three days. Thereupon the court proceeded with the hearing of said citation, and found the petitioner guilty of contempt in failing to comply with said decree, as thus modified by said *nunc pro tunc* order, and adjudged that petitioner pay a fine, and, in addition, be incarcerated in the county jail until he should comply with the requirements of said decree.

The execution of the judgment having been temporarily suspended by the court, petitioner has sued out this writ to prohibit further proceedings thereunder, claiming that the action of the court in the premises was beyond its jurisdiction and void.

We are of opinion that the position of the petitioner must be sustained. It is contended with much force that the superior court had no authority to change or

amend its decree at the time and in the manner attempted by the order made from the bench on August 1, 1893, extending the time of the Kofoeds for making tender thereunder. There is no question as to the power of the court at all times, in a proper case, to direct any amendment or correction in a judgment, to the end that the judgment as entered may express that which was rendered, and the record thus made to speak the fact. Mere clerical misprisions or omissions are subject to the correction of the court at any time by an order entered for that purpose. But the act of the court in this instance does not fall within that category. There was here no question but that the judgment, as entered, was exactly that rendered by the court in the first instance. The attempt made was to work a material modification and change in the terms of the decree affecting the rights of the parties thereunder, without formal motion therefor, and more than ten days after its entry, and that at a time when, by the strict terms of the decree, the parties in whose favor the modification was made had forfeited their rights thereunder. In fact, at the date when the allotted time within which a tender was to be made elapsed, the rights of those parties in the premises were vested in a third party, and they had at that time no interest therein. Furthermore, time would appear to have been made of the essence of the right given under the decree. By the decree, if the payment or tender was not made on or before the thirty-first day of July, 1893, "all the right, title, and interest of plaintiffs, or either of them, in and to the said contract and premises . . . shall cease and be at an end," etc. That such limitation may be put by the court upon the exercise of such right, and the parties concluded thereby, there is no doubt. ('76 *Land and Water Co. v. Superior Court*, 93 Cal. 139, 142.) These considerations render it extremely doubtful as to the power of the court to make said modification at the time and in the manner attempted, but in the view we take it is unnecessary to determine that question.

Assuming that, as contended by respondent, its general power over its judgment is such that the order in question, although possibly erroneous, is not void, there is yet an obvious reason why the action of the court in convicting petitioner of contempt cannot be sustained. While the recitals of the contempt judgment are somewhat vague and general, and such as to leave it in doubt upon which particular act petitioner's contempt is based, it must, of necessity, rest upon one of the offers or tenders made subsequent to the order extending the time. While the attempted tender of Bradshaw is, like the others, recited in the judgment, it is perfectly obvious that no contempt could be predicated of that tender, since it was clearly insufficient, and petitioner was not in fault in rejecting it; in fact, the order of the court in discharging him from the charge of contempt based upon that refusal manifestly proceeded upon that theory. The contempt, therefore, must consist in petitioner's refusal to accept either the offer of August 2, 1893, or that of January 25, 1895. As we have seen, at the date of these tenders there was no record evidence of any extension of the time for making such tender, but the decree stood unchanged as originally entered. It cannot be that one can be held guilty of a constructive contempt for refusing to comply with a direction or provision having no tangible existence of record, but consisting of a mere verbal announcement. Contempt of court is a specific criminal offense (*Ex parte Gould*, 99 Cal. 360; 37 Am. St. Rep. 57, and cases there cited); and it would be departing widely from the rule which so sacredly guards the personal liberty of the citizen to hold that a person may be convicted and punished criminally for a violation of a rule or direction having, if anything, but a mere potential existence. Decrees of court are required to be in writing, and remain of record, and those affected thereby have a right to stand upon such record. It was necessary, if the court had power, under the circumstances, to change the decree in the particular in question, to have such change made of record,

and knowledge thereof brought home to the petitioner on making the subsequent tender. Until that was done the petitioner had a right to regard the decree as entered as the final direction of the court in the premises.

Some question seems to be made as to prohibition being the proper remedy, but, under the circumstances of this case, we have no doubt that it is. It is conceded that there is no appeal, and the judgment of contempt, although entered, has not yet been carried out or executed. In *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, the office of this writ is exhaustively discussed, and it is there held that, while the operation of the writ is primarily and principally preventive, rather than remedial, and is excluded where the action of the inferior tribunal is fully completed and nothing remains to be done under its void order, yet, if its action is only partially and not fully completed, further proceedings may be stayed by prohibition.

In the view we have taken of the question discussed, the various other objections to the validity of the judgment in question need not be here considered.

It results that a peremptory writ should issue as prayed, and it is so ordered.

BEATTY, C. J., HENSHAW, J., MCFARLAND, J., HARRISON, J., and GAROUTTE, J., concurred.

Mr. Justice TEMPLE, not having heard the argument, did not participate in the foregoing decision.

[S. F. No. 94. In Bank.—November 13, 1895.]

**GEORGE E. WHITE, PETITIONER, v. SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, RESPONDENT.**

**DIVORCE—ALIMONY—SALE OF HUSBAND'S PROPERTY BY RECEIVER—APPEAL—CERTIORARI.**—An order after judgment directing the sale by a receiver of property of the husband for the purpose of satisfying a judgment for alimony is appealable, and, regardless of whether there is an excess of the jurisdiction of the court in making it, the remedy by appeal is conclusive of the right to review it upon *certiorari*.

**ID.—PROHIBITION—APPEAL—STAY OF PROCEEDINGS.**—The writ of prohibition lies only where there has been an excess of jurisdiction, and there is not a plain, speedy, and adequate remedy in the ordinary course of law; and where an appeal affords a complete and adequate remedy, and the same ends may be accomplished by it, and a stay of proceedings thereupon, as by writ of prohibition, although perhaps not in so expeditious a manner, the party is not entitled to the writ, but must resort to his remedy by appeal, although a question of jurisdiction may be involved.

**ID.—APPEAL FROM ORDER DIRECTING RECEIVER TO SELL—STAY OF PROCEEDINGS.**—By an appeal from an order directing a receiver to sell the property of the husband to satisfy a decree for alimony, the hand of the superior court and that of its instrument, the receiver, may be effectually stayed, pending the determination of the appeal, by giving the proper bond, and there can be no necessity in such a case for prohibition.

**APPLICATION** in the Supreme Court to review and prohibit the execution of an order of the Superior Court of the City and County of San Francisco requiring a receiver to sell the property of petitioner. **J. C. B. HEBBARD, Judge.**

**The facts are stated in the opinion of the court.**

**Barclay Henley, and Edward Lynch, for Petitioner.**

Prohibition and *certiorari* are appropriate writs to arrest and review the proceedings of the superior court in ordering the receiver to make a sale in excess of the jurisdiction of the court. (*French Bank case*, 53 Cal. 495; *Bateman v. Superior Court*, 54 Cal. 286; *State Inv. etc. Co. v. Superior Court*, 101 Cal. 135; *People's Home Savings Bank v. Superior Court*, 103 Cal. 34.)



*Henry E. Highton, Walter H. Linforth, and William T. Baggett, for Respondent.*

The order sought to be reviewed was made after judgment and is appealable, and, therefore, is not reviewable by *certiorari* or otherwise than by appeal. (Code Civ. Proc., secs. 939, 963, 1068; *Bennett v. Wallace*, 43 Cal. 25, 26; *Newman v. Superior Court*, 62 Cal. 545; *Golden Gate etc. Co. v. Superior Court*, 65 Cal. 188; *Slavonic Illyric Mut. Ben. Assn. v. Superior Court*, 65 Cal. 500, 501; *Stuttmeister v. Superior Court*, 71 Cal. 322; *McCue v. Superior Court*, 71 Cal. 545; *In re McConnell*, 74 Cal. 217, 219; *Gibson v. Superior Court*, 83 Cal. 643.) The fact that the order was without jurisdiction does not authorize review by *certiorari* if appeal is provided. (*Sturgis v. Shepard*, 28 Cal. 115.) The writ of prohibition lies only where there is not a plain, speedy, and adequate remedy in ordinary course of law. (Code Civ. Proc., sec. 1103; *Murphy v. Superior Court*, 84 Cal. 592; *Strouse v. Police Court*, 85 Cal. 49; *Agassiz v. Superior Court*, 90 Cal. 101.) An appeal is a plain, speedy, and adequate remedy. (*Powelson v. Lockwood*, 82 Cal. 613; *Murphy v. Superior Court*, 84 Cal. 592; *Childs v. Edmunds* (Cal., March 9, 1884), 10 Pac. Rep. 130; *Mancello v. Bell-rude* (Cal., June 15, 1886), 11 Pac. Rep. 501.) The writ of prohibition lies only where the proceedings complained of are without or in excess of the jurisdiction of such tribunal. (Code Civ. Proc., sec. 1102; *People v. Supervisors*, 47 Cal. 81; *People v. Whitney*, 47 Cal. 584; *Sacramento etc. R. R. Co. v. Superior Court*, 55 Cal. 457; *Kalloch v. Superior Court*, 56 Cal. 229; *More v. Superior Court*, 64 Cal. 345; *Agassiz v. Superior Court*, *supra*; *History Co. v. Light*, 97 Cal. 56.)

VAN FLEET, J.—This is an original proceeding, which in the matter of remedies sought is somewhat multifarious, and consequently not susceptible of single definition.

Petitioner asks for *certiorari* to review, and prohibition to stop, the execution of a certain order of the re-

spondent court complained of. From the petition and the return thereto it appears that, in an action for divorce pending in said superior court, in which the petitioner, George E. White, is plaintiff, and one Frankie White, defendant, a decree of divorce was entered in May, 1889, and the question of the property rights of the parties referred to a referee for report thereon. Subsequently, in June, 1894, a receiver was appointed in said cause to take charge and possession of the property, real and personal, of the plaintiff therein, the petitioner here, and hold, manage, and control the same, under the supervision of said superior court, until further order in the premises. On February 9, 1895, the report of the referee having been received, said court made and entered its final decree in said action, awarding to the defendant therein, Frankie White, the sum of one hundred thousand dollars as permanent and final alimony, allowances, etc., and directing that the receiver theretofore appointed be continued as such, and take all necessary and proper measures to enforce and secure the payment and satisfaction of the amount awarded by said decree, and certain unpaid monthly allowances due, and after such payment to hold any residue of said property subject to the further order of the court.

Thereafter, on the nineteenth day of April, 1895, said court, on application of the defendant in said cause, and against the objections of the petitioner, made an order therein, requiring and directing said receiver to proceed as such and sell the property of the petitioner, so far as should be necessary, in satisfaction of said judgment. It is this last-mentioned order which is made the subject of attack herein. Petitioner alleges that the making of said order directing a sale by said receiver of petitioner's property, consisting in large part of lands in different counties of the state, for the satisfaction of a mere money judgment, such as it is contended the final decree in said cause in effect is, is beyond the jurisdiction of said superior court, and contrary to the course of the law, for various alleged reasons not necessary to

be here recited; that the only competent way in which said property can be sold in satisfaction of said judgment or decree is by execution at the hands of the sheriff, and that a sale by said receiver will operate to deprive petitioner of his property without due process of law.

Without examining into the question of the power of the court to make said order, it is apparent, we think, at the threshold that, upon the facts stated, petitioner is entitled to neither remedy sought.

1. It is very clear that the facts do not make a case wherein *certiorari* may be availed of. That writ will lie only where there is no appeal from the judgment or order complained of. (Code Civ. Proc., sec. 1068; *Stuttmeister v. Superior Court*, 71 Cal. 322, and cases there cited.) The order in question is a special order, made after final judgment, and, as such, is made the subject of appeal by express terms of the statute (Code Civ. Proc., sec. 939, subd. 3; sec. 963, subd. 2; *Slavonic etc. Assn. v. Superior Court*, 65 Cal. 500; *Livermore v. Campbell*, 52 Cal. 75; *Calderwood v. Peyser*, 42 Cal. 110); and, being so appealable, it cannot be reviewed by *certiorari*.

Nor does it make any difference in this respect if the order be, as contended, in excess of the jurisdiction of the court making it, and consequently void. Void judgments and orders are not the less appealable by reason of that fact (*Livermore v. Campbell*, *supra*); and when that remedy is afforded it excludes the right to *certiorari*, notwithstanding the order be void in the extreme sense. (*People v. Shepard*, 28 Cal. 115; *Stoddart v. Superior Court*, 108 Cal. 303.) "It may be readily admitted," says Mr. Justice McFarland in delivering the opinion of the court in the case last cited, "that the court had no jurisdiction to make the order; but, as the order is appealable, *certiorari* will not lie, because it lies only when 'there is no appeal.'"

So far, then, as the remedy by *certiorari* is concerned, it would be wholly unprofitable to consider the question

as to the jurisdiction of the respondent to make the order complained of.

2. And we regard it as equally clear that the case is not one for prohibition. The writ of prohibition lies only where there has been an excess of jurisdiction and there is "not a plain, speedy, and adequate remedy in the ordinary course of law." (Code Civ. Proc., secs. 1102, 1103.) The petitioner having the right of appeal from the order under consideration, the question arises whether this right affords him "a plain, speedy, and adequate remedy" for the correction of the wrong complained of, since, unlike the provision with reference to *certiorari*, the mere right of appeal, independently of its affording adequate relief, does not, *ipso facto*, deprive him of the remedy by prohibition. (*Havemeyer v. Superior Court*, 84 Cal. 327, 397; 18 Am. St. Rep. 192.) It is well established, however, that when an appeal affords a complete and adequate remedy, and the same ends may be accomplished, although perhaps not in so expeditious a manner, the party is not entitled to the extraordinary remedy by prohibition, but must have resort to his remedy by appeal. In *Agassiz v. Superior Court*, 90 Cal. 101, it is said: "Petitioners have the right to appeal from the order refusing to dissolve the attachment, and would have an appeal from any final judgment in the case; and such appeal being 'a plain, speedy, and adequate remedy in the ordinary course of law,' within the meaning of section 1103 of the Code of Civil Procedure, prohibition does not lie. A remedy does not fail to be speedy and adequate because, by pursuing it through the ordinary course of law, more time would probably be consumed than in the proceeding here sought to be used, and it makes no difference that in this instance a question of jurisdiction incidentally depends upon the validity of an attachment."

In *Grant v. Superior Court*, 106 Cal. 324, a writ of prohibition was sought to restrain the superior court from making an order fixing the compensation of a receiver, whose appointment in the action was admittedly

void, and it was said by this court: "We are of opinion that, whether the proceeding which the petitioners seek to arrest is or is not without or in excess of the jurisdiction of the superior court, the writ of prohibition ought not to issue, for the reason that the petitioners have a plain, speedy, and adequate remedy by appeal from any order the court may make by which they would be injuriously affected. . . . If we are right in the conclusion that any party aggrieved by an order of court directing him to pay the receiver's compensation, or directing payment out of a fund in which he is interested, has an appeal from such order, as from a final judgment in an independent proceeding collateral to the main action, and that he may stay all proceedings upon such order, pending his appeal, by filing a proper undertaking, there can be no need of a writ of prohibition in such a case, and it will not lie. (See cases referred to in *Havemeyer v. Superior Court, supra.*)"

In this case no reason is urged why the right of appeal which petitioner enjoys will not furnish him complete and full relief in the premises. By such appeal the hand of the superior court, and that of its instrument, the receiver, can be effectually stayed, pending its determination, by giving the proper bond, and thus the rights of the petitioner be adequately preserved until finally determined. Under such circumstances, there can be no necessity for prohibition. In this view, it becomes quite as impertinent here as in disposing of petitioner's right to *certiorari* to inquire into the power of the court to make the order in question.

It follows that the rule must be discharged and the application denied.

It is so ordered.

GAROUTTE, J., HARRISON, J., MCFARLAND, J., HENSHAW, J., and BEATTY, C. J., concurred.

Mr. Justice TEMPLE, not having heard the argument, did not participate in the foregoing.

[S. F. 118. In Bank.—November 13, 1895.]

GEORGE E. WHITE, PETITIONER, v. SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, RESPONDENT.

**CERTIORARI—JURISDICTION—ERRORS NOT REVIEWABLE.**—Upon *certiorari* the single question involved is whether the lower court has exceeded its jurisdiction; and, if it has not, no matter how grievously it may have erred, either in matters of fact or matters of law, the writ of *certiorari* will not afford relief to the party prejudiced; and, where recitals of fact in the judgment or order are sufficient to sustain it, those recitals are conclusive, and no evidence can be received to impeach them.

**ID.—PROCEEDINGS FOR CONTEMPT—DIVORCE—DECREE RESPECTIVE PROPERTY RIGHTS.**—The court having jurisdiction of an action for divorce, has power to put a proper restraint upon the disposition of property by the husband, pending the final determination of the rights of the parties therein; and, where the decree of divorce reserving property rights for future consideration enjoins the husband from making any disposition of his property until the final decree is entered, the court has power to punish him for contempt in making leases of his land in violation of the injunction, and interfering with and obstructing the receiver appointed by the court in his efforts to take possession of the property; and *certiorari* will not lie to review any error in the injunction order which could have been corrected by appeal, nor any question of fact passed upon in the proceedings for contempt.

**ID.—FORMER ADJUDICATION—JEOPARDY—POWER OF COURT.**—The defense of a former adjudication does not go to the jurisdiction of the court, and when the question of whether the contempt charge has been before adjudicated, or whether the petitioner has been twice in jeopardy for the acts of which he was convicted of contempt, the court has the same power to pass upon it as upon any other question in the case; and any error in its ruling cannot be reviewed upon *certiorari*.

**ID.—TRANSFER OF DIVORCE CASE—VIOLATION OF RULE.**—The fact that the divorce action in which the proceedings for contempt were had was transferred by the presiding judge from one department of the superior court to another, in violation of a rule of court, does not involve the question of jurisdiction, nor render the judgment void.

**ID.—DEPARTMENT OF SUPERIOR COURT—JURISDICTION—TRANSFER OF CASE—CONSTITUTIONAL LAW.**—The jurisdiction of causes is vested by the constitution in the superior court and not in any particular judge or department thereof, although it provides that there may be as many sessions of the court at the same time as there are judges, yet, whether sitting separately or together, the judges hold but one and the same court, and the division into departments is purely imaginary, and for the conveniences of business and of designation; and transferring a cause from one department to another does not effect a change or transfer of the jurisdiction, which remains at all times in the court as a single entity.

**ID.—POWER OF PRESIDING JUDGE—RULES—RETRANSFER.**—The fact that rules adopted by the judges of the superior court of the city and county of San Francisco are violated by the presiding judge cannot affect his power to distribute the business of the court among the judges thereof or affect the jurisdiction of the court over any cause assigned to any department; nor is the power of the presiding judge exhausted by the original assignment of an action or proceeding, but a cause may be reassigned or transferred, even irregularly, without jeopardizing the jurisdiction of the court.

**APPLICATION** in the Supreme Court for *certiorari* to review an order of the Superior Court of the City and County of San Francisco adjudging petitioner guilty of contempt. J. C. B. HEBBARD, Judge.

The facts are stated in the opinion of the court.

*Barclay Henley*, and *Edward Lynch*, for Petitioner.

The action having been transferred to Department Four by the presiding judge without motion and notice, as required by the rules of the court, Judge Hebbard, presiding in Department Four, had no jurisdiction of the action or of the parties. Rules of court are binding upon the court and its suitors, and must be obeyed, and construed as statutes. (*Hanson v. McCue*, 43 Cal. 178. *In re Jessup*, 81 Cal. 483; *Callahan v. Hickey*, 63 Cal. 438.) One court has no power to punish a contempt of another court. (*People v. County Judge*, 27 Cal. 152; *Rapalje on Contempts*, sec. 13.) The court had no jurisdiction to perpetually enjoin White from transferring his property, but could only create a lien thereon. (*Perkins v. Perkins*, 16 Mich. 163-67; *Errissman v. Errissman*, 25 Ill. 136; Civ. Code, secs. 137, 140.) Disobedience of a void order is not a contempt. (*Harrison v. Hebbard*, 101 Cal. 152; *Ex parte Henshaw*, 73 Cal. 508; *Brown v. Moore*, 61 Cal. 432, 485; *Ex parte Hollis*, 59 Cal. 408; *Ex parte Kearny*, 55 Cal. 212.) The plaintiff has been twice in jeopardy and twice acquitted of the same contempt, and has a constitutional right not to be punished therefor. (Const., art. I, sec. 13; *Ex parte Lange*, 18 Wall. 163; *Bruner v. Superior Court*, 92 Cal. 260.) A contempt is a criminal proceeding, subject to

all the laws governing the same. (*Ex parte Gould*, 99 Cal. 362; 37 Am. St. Rep. 57; *In re Buckley*, 69 Cal. 3; *Batchelder v. Moore*, 42 Cal. 414; *Lezinsky v. Superior Court*, 72 Cal. 511.)

*Henry E. Highton, W. H. Linforth, and W. F. Baggett,*  
for Respondent.

The superior court had power to make the injunction which was disobeyed. (Code Civ. Proc., sec. 526.) Its power over the injunction cannot be collaterally attacked. (*Prader v. Purkett*, 13 Cal. 588, 591; *Ex parte Cohen*, 5 Cal. 494-96.) Each act violative of an injunction may be punished as a contempt. (*Golden Gate etc. Co. v. Superior Court*, 65 Cal. 187, 192; *Hedges v. Superior Court*, 67 Cal. 405; *Dewey v. Superior Court*, 81 Cal. 64, 68.) The only question before the court is whether the judgment of contempt upon its face shows a contempt. (*Central Pac. R. R. Co. v. Placer County*, 43 Cal. 365, 367; *Loaiza v. Superior Court*, 85 Cal. 11, 35; 20 Am. St. Rep. 197; *Buckley v. Superior Court*, 96 Cal. 119, 120; *History Co. v. Light*, 97 Cal. 56, 58; *People v. Board of Delegates*, 14 Cal. 479, 499, 500; *Von Roun v. Superior Court*, 58 Cal. 358, 359.) The judgments and orders of final contempt are final and conclusive, and the only question to be raised is the single point of jurisdiction. (*Ex parte Cohen, supra*; *Ex parte Smith*, 63 Cal. 204, 207; *Dewey v. Superior Court, supra*; *Golden Gate etc. Co. v. Superior Court, supra*; *Ex parte Sternes*, 77 Cal. 156, 163; 11 Am. St. Rep. 251; *Ex parte Ah Men*, 77 Cal. 198, 202; *Farmers' etc. Bank v. Board of Equalization*, 97 Cal. 318, 320, 321.) The claim of once in jeopardy cannot be considered upon *certiorari*. (*Muir v. Superior Court*, 58 Cal. 361.)

VAN FLEET, J.—Application for *certiorari* to review an order of said court, Department Four thereof, adjudging petitioner guilty of contempt.

In the case of *George E. White v. Frankie White*, pending in said superior court, wherein petitioner is the



plaintiff, the superior court entered a decree divorcing the parties, and, by said decree, after reserving the property rights of the parties for future consideration, it is provided:

"That until the further, supplemental, and final decree aforesaid is duly entered, recorded, and carried into effect, the plaintiff, his agents, attorneys, trustees, employees, and servants, and each of them, be, and they hereby are, enjoined and restrained from selling, conveying, alienating, assigning, transferring, mortgaging, hypothecating, encumbering, or in any manner disposing of, embarrassing, complicating, or affecting the community property of the plaintiff and the defendant, real and personal, or any part or portions thereof, and his own separate property, real and personal, including all moneys and securities the plaintiff has on hand, and the income derived from said property, or any part or portions thereof, except that plaintiff may be permitted to pursue and carry on his usual and ordinary business, and with respect to the whole of said property, from doing, or permitting, or suffering to be done, any act or acts in violation of the rights, or any of them, of the defendant respecting the subject of this action, or tending to render the judgment or decree in favor of the defendant, or any part thereof, ineffectual."

Subsequent to the entry of said decree the superior court appointed a receiver in said action, and directed him to take possession and control of all the property of petitioner, and hold it subject to the direction and control of the court. The proceeding for contempt against petitioner was commenced since the making of the decree and order aforesaid, and the acts charged as constituting such contempt were in making two certain leases of his lands, in violation of the injunction contained in said decree, and in interfering with and obstructing the receiver in the efforts of the latter to take possession of said property. Petitioner, having been duly cited and tried, was found guilty of the acts charged, and it was adjudged that they constituted a

willful contempt of said court, and petitioner was sentenced to suffer five days' imprisonment in jail, and to pay a fine of five hundred dollars. He seeks by this proceeding to have the judgment of contempt annulled.

Numerous grounds are urged against the validity of said judgment, but we regard most of them as possessing little, if any, merit. Many of the allegations contained in the very voluminous petition, and a considerable part of petitioner's argument, relate to matters of fact and propositions of law which can by no possibility arise or be considered upon *certiorari*, for the simple reason that they in no manner involve the question of jurisdiction, but go only to that of mere error in the rulings of the superior court in the matter complained of. Nothing is better understood than that on this proceeding the single question involved is whether the lower court has exceeded its jurisdiction. If it has not, no matter how grievously it may have erred to the prejudice of the petitioner, either in matters of fact or matters of law, this writ will not afford an avenue of relief. (*Central Pac. R. R. Co. v. Placer County*, 43 Cal. 365; *People v. Board of Delegates*, 14 Cal. 479; *Buckley v. Superior Court*, 96 Cal. 119; *Loaiza v. Superior Court*, 85 Cal. 11, 35; 20 Am. St. Rep. 197.) the question being purely one of power, the mere manner in which the contempt proceeding was tried, the rulings of the court upon the admissibility of evidence, and kindred matters, are things wholly without the range of our investigation. Nor can we look into the evidence to inquire as to its sufficiency to sustain the finding and conclusion of the superior court. If the court had jurisdiction, and the recitals of the judgment or order are sufficient to sustain it, those recitals are conclusive upon us in this proceeding. We are confined to the record. "If the order is one which the court had power to make, it is not for us to inquire whether this power was properly exercised or not. The writ of review is not a writ of error." (*Von Roun v. Superior Court*, 58 Cal. 358.)

"The mere grounds upon which the determination was reached may or may not be correct in themselves. These may be supported by evidence inadmissible when tested by the rules governing the introduction of evidence. The reasons given for the conclusion arrived at may or may not be such as address themselves to the judgment of others, but erroneous views entertained, or incorrect reasons assigned, or evidence erroneously admitted in deciding the controversy, do not make a case of want of jurisdiction." (*Central Pac. R. R. Co. v. Placer County, supra.*) In *Ex parte Ah Men*, 77 Cal. 198, it is said: "Nearly all of the objections urged against the validity of the judgment convicting petitioner of a contempt are answered by the recitals in the judgment itself. If the record were silent as to the jurisdictional facts, jurisdiction would be presumed; but the judgment itself recites all the facts necessary to the exercise of jurisdiction by the court. . . . The matters adjudicated are conclusive, and no evidence *dehors* the record can be received to impeach them." (See, also, *Ex parte Sternes*, 77 Cal. 156; 11 Am. St. Rep. 251; *Farmers' etc. Bank v. Board of Equalization*, 97 Cal. 317; *Buckley v. Superior Court, supra.*)

These considerations strip the case of much of its bulk, and render it unnecessary to notice in detail many questions raised, which, it will readily be perceived, are swept aside by the principles above announced.

Within those principles falls the objection that the superior court had no power to put the restraint upon petitioner's right to dispose of his property, which it does by the injunction contained in its decree, and, consequently, that petitioner was guilty of no contempt for violating it. It is not questioned that the court had jurisdiction of the action for divorce, and power to put a proper restraint upon the disposition of the property, pending the final determination of the rights of the parties therein, but it is claimed that the restraint here is practically perpetual, and that this it was beyond the

power of the court to make. It is perfectly obvious that this, if true, would not amount to an excess of jurisdiction, but an error merely, which could be corrected upon appeal, and, until so corrected, the decree would be obligatory upon the parties, and they would violate its terms under pain of contempt. (*Ex parte Cohen*, 5 Cal. 494.)

Within the same general principles is the further objection that the facts alleged in the petition show that the petitioner has been twice in jeopardy for the acts for which he was convicted of contempt. In *Muir v. Superior Court*, 58 Cal. 361, in passing upon the same objection, the court say: "The defense of a former adjudication does not go to the jurisdiction of the court. In this case, when the question of whether the contempt charge has been before adjudicated was raised, the court had the same power to pass upon it as it had to pass upon any other question in the case; and, if it erred in holding that there was not such former adjudication, as claimed, the error cannot be reviewed upon *certiorari*. That writ lies only in cases where the inferior tribunal has exceeded its jurisdiction."

This leaves substantially but one objection to be disposed of. It is claimed that neither the department of said court in which the contempt proceeding was tried, nor the judge thereof, ever acquired jurisdiction of said cause or of the parties, for the reason, as it is alleged, that said divorce action was never lawfully transferred thereto. This contention is based upon the fact, set forth in the petition, that the action was originally assigned for trial to Department One of said court, and after being there partially disposed of, and said decree of divorce entered therein, was by the presiding judge of said court transferred for further disposition to said Department Four, wherein the judgment of contempt was entered. The rule of said court providing for the method of transferring a cause from one department to another is set out, and facts are alleged showing that the order transferring the action of *White v. White* was

not made in accord with the requirements of that rule, but in disregard and violation thereof; and it is urged that, by reason of this fact, Department Four and the judge presiding therein never became vested with power to hear or determine said contempt, and that its judgment in the premises is void. But, taking the facts to be true, and they are not denied, they in no way involve the question of jurisdiction. The jurisdiction of causes is vested by the constitution in the *court*, not in any particular judge or department thereof. The constitution, in fact, says nothing about departments. It provides that there may be as many sessions of the court at the same time as there are judges (Const., art. VI, sec. 6); but, whether sitting separately or together, the judges hold but one and the same court, and the jurisdiction they exercise in any cause is that of the court, and not the individual. The division into departments is purely imaginary, and for the conveniences of business and of designation. Transferring a cause for trial or disposition from one of those departments to another does not effect a change or transfer of the jurisdiction of that cause; that remains at all times in the court as a single entity. The same section of the constitution provides that the judges of the superior court of the city and county of San Francisco shall choose a presiding judge from their number, who "shall distribute the business of the court among the judges thereof, and prescribe the order of business"; and it seems that the judges of that court have adopted rules for the guidance of the presiding judge in the performance of that duty, which it was competent for them to do, so long as those rules violate no express or implied provision of law. But it is perfectly obvious that, however proper those rules may be, or however desirable or essential to the impartial and orderly conduct of the business of the court that they should be adhered to, their violation in any instance cannot affect the jurisdiction of the court over a cause. The power to distribute and regulate the business of the court resting with the presiding judge,

though it be exercised in a grossly unfair and arbitrary manner, is not an excess of power, but an abuse of it. The remedy for such abuse rests in the hands of the judges of that court, since they have the power to remove that functionary at their pleasure and substitute another in his stead. And, possibly, in an instance where the violation of the rules of the court by the judge, without notice to a party litigant, worked the latter an injury by depriving him of some substantial right, the act would amount to an irregularity which could be corrected on appeal. (*Callahan v. Hickey*, 63 Cal. 438.) But we do not understand that, after a cause has been once assigned, it may not be reassigned or transferred, even irregularly, without jeopardizing the jurisdiction of the court therein. The power of the presiding judge in the premises is not exhausted by the original assignment of an action or proceeding. Such construction would tend to impede, rather than facilitate, the administration of the business of the court, and defeat in large part the very purpose of the provision in question.

We have considered the other points made, but, as they are all, in our judgment, covered by what has been already said, they require no special notice. We are satisfied that the record does not disclose an excess of jurisdiction, and, consequently, no case is made for our interposition by the remedy of *certiorari*. It follows that the writ should be dismissed, and it is so ordered.

GAROUTTE, J., HARRISON, J., MCFARLAND, J., HENSHAW, J., and BEATTY, C. J., concurred.

Rehearing denied.

Mr. Justice TEMPLE, not having heard the argument, did not participate in the foregoing.

[No. 18409. Department Two.—November 14, 1895.]

**THE FIRST NATIONAL BANK OF FRESNO, RE-  
SPONDENT, v. FRANK DUSY, APPELLANT.**

**FORECLOSURE OF MORTGAGE—PLEDGE—COLLATERAL SECURITY—TRUST—**

**EVIDENCE—HARMLESS RULING.**—In an action to foreclose a mortgage and a pledge of water stock, in which the complaint alleges the execution of a promissory note by the defendant to the plaintiff, payable on demand, with provision for a reasonable attorney's fee in case of suit, and an assignment of shares of water stock as security therefor, and that as further security the defendant afterward executed and delivered to a third party a note and mortgage for a larger sum, which was assigned to the plaintiff, and it was sought to foreclose the mortgage so assigned, and the pledge of the water stock, for the amount only of the original note, and for a reasonable attorney's fee, and the answer of the defendant denied that the mortgage was executed to secure the payment of the original note held by plaintiff, but alleged that it was executed in trust to the payee thereof to take up and deliver three notes of the defendant, aggregating the principal sum named in the mortgage, one of which was the note in suit, and that the trust was violated by the mortgagee, and the mortgage transferred to the plaintiff without the knowledge and consent of the defendant, in violation of said trust, the collateral note and mortgage are admissible in evidence under the issues tendered; and where the court found in favor of the plaintiff upon all of the issues, and foreclosed the mortgage for the amount of the original note and interest, the mortgagor could not be prejudiced by rulings upon the admission of evidence respecting the mortgage, and as to whether the mortgagee had failed to take up the notes as alleged by the defendant.

**Id.—MISTAKE IN FINDINGS AND JUDGMENT—FAILURE TO FORECLOSE PLEDGE—AMENDMENT—JURISDICTION.**—In an action to foreclose a mortgage and a pledge of water stock, where neither the conclusions of law, nor the order for judgment, nor the judgment as entered make any disposition of the stock which was pledged as security for the debt, the trial court has no jurisdiction, after the entry of judgment foreclosing the mortgage, to amend the findings and judgment so as to provide further for a foreclosure of the pledge.

**Id.—DECISION AGAINST LAW—NEW TRIAL—APPEAL.**—The failure of the court to order and adjudge the foreclosure of the pledge of water stock is an error of law which may be assigned by the defendant as a decision against law in his motion for a new trial, and such erroneous decision could only be corrected in the court below by granting the motion for a new trial; but where the fact that the pledge of the water stock was made, and that it preceded the mortgage security foreclosed, is admitted by the answer, the appellate court may, upon appeal, order a modification of the judgment so as to include an order of sale of the water stock, and to order it to be first sold, unless the defendant should otherwise direct.

APPEAL from a judgment of the Superior Court of the County of Fresno and from an order denying a new trial. J. R. WEBB, Judge.

The facts are stated in the opinion.

*Wiley J. Tinnin*, for Appellant.

The lower court had no jurisdiction to order the clerk to amend the judgment by inserting new matter into it nearly two months after the judgment was entered in the records of the court. (*Bate v. Miller*, 63 Cal. 233; *Wunderlin v. Cadogan*, 75 Cal. 617; *Smith v. Taylor*, 82 Cal. 544; *Los Angeles County v. Lankershim*, 100 Cal. 525.)

*George E. Church*, for Respondent.

As there was no change made in the findings of fact, the alteration in the judgment was, at most, the correction of a mere misprision. (*Estate of Schroeder*, 46 Cal. 316; *Wunderlin v. Cadogan*, 75 Cal. 617.)

HAYNES, C.—Action to foreclose a mortgage and a pledge of water stock. Findings and decree passed in favor of the plaintiff, and Dusy, the debtor and mortgagor, appeals from the judgment and from an order denying a new trial. The demand sought to be foreclosed was a promissory note for \$1,900, made by Dusy to the plaintiff December 28, 1889, payable on demand. Said note also provided that in case of suit a reasonable attorney's fee should be allowed by the court. As security for the payment of this note, Dusy assigned to the bank sixteen and one-half shares of the capital stock of the Fowler's Switch Canal Company.

The complaint further alleged that on December 20, 1892, defendant Dusy, as further security for the payment of said note, executed and delivered to O. J. Woodward his promissory note of that date for \$4,500, payable on demand, and at the same time executed to said Woodward a mortgage on certain real estate therein described, which note and mortgage Woodward duly assigned and



transferred to the plaintiff, and prayed for judgment for the amount of said first-named promissory note with interest as therein provided, and for the sum of \$200 as a reasonable attorney's fee in the action, and that said mortgaged premises and said water stock be sold to satisfy the same. Defendant's demurrer to the complaint was overruled, and defendant Dusy answered and denied that the mortgage described in plaintiff's complaint is a lien on any of the property described therein; and also denied that the note for \$4,500 and the mortgage were executed to Woodward to secure the payment of said \$1,900 note, and alleged that said \$4,500 note and mortgage were delivered to Woodward in trust to take up and deliver to the defendant three of defendant's promissory notes, one of said notes being the one for the sum of \$1,900 mentioned in plaintiff's complaint, and that all three of said notes aggregate the sum of about \$4,500; that Woodward violated said trust in that he failed to take up said notes, or either of them, and that he had placed said mortgage on record as a lien on defendant's property, and that he transferred said \$4,500 note to plaintiff without the knowledge and consent of the defendant, and in violation of his said trust and agreement; that the bank took said transfer with full knowledge of the trust and agreement between Woodward and defendant, and that said note and mortgage were without any consideration whatever.

Defendant also filed a cross-complaint setting out substantially the same facts, and prayed for judgment against the plaintiff for his costs. Plaintiff answered the cross-complaint, denied that Woodward agreed in any way whatever to take up or cancel any of defendant's notes as a condition of the execution of said note and mortgage, and alleged, as was alleged in the complaint, that defendant executed and delivered said note and mortgage as further security for the payment of said note for \$1,900.

The findings were in favor of the plaintiff upon all the issues, and judgment was entered thereon. It ap-

peared from the evidence that at the time the note for \$4,500 and the mortgage to secure the same were executed, that Dusy was indebted to the Bank of Selma upon two promissory notes, one for the sum of about \$1,300 and the other for \$800, and interest on each of them; that one of these notes was secured by a pledge of stock in the Fowler's Switch Canal Company, and the other by a mortgage upon the same property mortgaged to Woodward; that Woodward was a director in the Bank of Selma, and was president and general manager of the First National Bank of Fresno, the plaintiff in this action, and that his intention was to have this mortgage as additional security for defendant's indebtedness to the Bank of Selma, as well as for the \$1,900 note held by plaintiff; but the Bank of Selma was satisfied with the security already held by it, and declined to avail itself of the additional security, and, in this action, the plaintiff only sought to recover the amount due upon the \$1,900 note, together with its costs and a reasonable attorney's fee as provided for in said \$1,900 note, as well as in the collateral note and mortgage.

The court did not err in admitting in evidence the collateral note and mortgage. That, as well as the \$1,900 note, was set out in the complaint, and as it was conceded in the complaint that appellant's indebtedness to the plaintiff was only the amount of the original note and interest, and as only that sum was recovered, appellant was not prejudiced by any of the rulings upon the admission of evidence specified by appellant, whether they were technically correct or not. They need not, therefore, be considered in detail. It does not appear that it would have benefited appellant if plaintiff or Woodward had paid the claims held by the Bank of Selma, and, as the court found upon sufficient evidence that Woodward did not agree to pay those claims, appellant was not prejudiced by the ruling of the court upon the question whether he had paid them. These remarks also dispose of the questions put to Stroud in relation to the same matter.

It is also specified by appellant in his statement on motion for a new trial that the decision of the court is against law, in that the pleadings and evidence in said action show that defendant, to secure the \$1,900 note, delivered to plaintiff sixteen and one-half shares of the Fowler's Switch Canal Company's stock, and that no finding is made in regard thereto, and that the judgment neither orders said shares of stock to be sold nor to be delivered to defendant, and that said shares of stock are left in the hands of plaintiff without any consideration to defendant.

The third finding is to the effect that appellant assigned said stock to the plaintiff, and that plaintiff now holds said stock as security, and that said stock is evidenced by the certificate issued to O. J. Woodward, as trustee, and numbered 463. It is true, however, that neither the order for judgment nor the judgment as entered made any disposition of said stock; and this omission presents the principal question in the case.

The findings in said cause were filed and judgment entered on the 28th of April, 1894, and notice of defendant's intention to move for a new trial was given on May 8th. Appellant's statement on motion for a new trial was served on plaintiff's attorney June 6, 1894. On June 18, 1894, the plaintiff served and filed notice that on the 23d of June, 1894, the plaintiff would move the court to amend the conclusions of law filed in said action by inserting after the word "mortgage," in a designated place, the words "together with the said sixteen and one-half shares of stock"; and also to amend the judgment herein by inserting in a designated place the words "together with the sixteen and one-half shares of stock also described therein." This motion was based upon an affidavit made by counsel for the plaintiff, "that by mistake and inadvertence said court omitted to find, as a conclusion of law, that the said plaintiff is entitled to have said shares of stock sold, and the proceeds applied to satisfy said judgment so made and entered herein, and, by like inadvertence,

the judgment so made, given, and entered herein failed to provide that said shares of stock be sold, and the proceeds applied to the payment of said judgment."

Defendant's counsel objected to the consideration of the motion: 1. "That the judgment therein had been duly given or made, rendered, and entered in said action, and that also the said matter was then pending on motion for a new trial, and was without the jurisdiction of the court"; 2. "That the said motion and the said affidavit were each irrelevant, incompetent, and immaterial, in that the findings and conclusions of law and judgment had been rendered and entered."

The court overruled these objections, and ordered the clerk to amend the conclusions of law as requested by plaintiff, and also to amend the judgment by inserting the words stated in said notice of motion; and to this ruling of the court, and the order so made, the defendant excepted.

Counsel for respondent, upon this point says, that "the only change made was to make the judgment entered conform with the judgment as pronounced by the court." If that were true, there would be no question as to the power of the court to make the amendment. But the water stock was not included in or affected by *the order* of the court upon which the judgment as originally entered was based. The conclusions of law were, in substance, simply that the plaintiff was entitled to a judgment for a specified sum of money, with a specified sum as attorney's fees, and costs of suit; that the said amounts were a valid lien upon the lands and premises described in the complaint, and that plaintiff is entitled to have said premises sold according to law, and the proceeds applied, etc.; and concludes with the order, "let judgment be entered accordingly."

It is clear that the judgment as originally entered was in precise accordance with the conclusions of law and the order of the court. Whether the water stock should be sold at all to satisfy the plaintiff's claim, or whether it should be sold before resorting to the real estate em-

braced in the mortgage, or whether the stock should be surrendered to the defendant, were judicial questions, which the court failed to pass upon, and this failure was an error of law, which it was not in the power of the court to correct upon motion.

It is true the complaint alleged a lien upon the stock, and prayed that it might be sold as well as the real estate, and the court found, as a fact, that the stock was assigned to the plaintiff, and was then held as security for the payment of said \$1,900 note, and no reason appears upon the face of the judgment-roll why it should not be sold in satisfaction of the plaintiff's judgment. But, as said above, the making of an order that it be sold involves judicial action, and we think the better rule is, as to such omissions or mistakes, that it is not in the power of the court after the entry of judgment to make a new order directing the sale of other property than that embraced in the original order and the judgment entered thereon; that such direction would be equivalent to exercising a revisory power over the judgment itself by the same authority that pronounced it. (See Freeman on Judgments, sec. 70, and cases cited in note 2.) The same author in the same section says: "To entitle a party to an order amending a judgment, order, or decree he must establish that the entry as made does not conform to what the court ordered." And, again: "On the one hand, it is certain that proceedings for the amendment of judgment ought never to be permitted to become revisory or appellate in their nature; ought never to be the means of modifying or enlarging the judgment or the judgment record, so that it shall express something which the court did not pronounce, even though the proposed amendment embraces matters which ought clearly to have been so pronounced."

The decision of the court, referred to in sections 632 and 633 of the Code of Civil Procedure, when filed, amounts in law to a rendition of the judgment. (*San Joaquin etc. Co. v. West*, 99 Cal. 347.) "The rendition of a judgment is a judicial act. Its entering upon the

record is merely ministerial." (*Crim v. Kessing*, 89 Cal. 478; 23 Am. St. Rep. 491.)

In *Sichel v. Carrillo*, 42 Cal. 507, the question whether conclusions of law could be changed before the entry of judgment thereon was made, but not decided. In *Condee v. Barton*, 62 Cal. 1, it was held that the conclusions of law first announced were not final and beyond the reach of the court, so as to preclude the court from changing them at any time before the judgment is entered. In *Broder v. Conklin*, 98 Cal. 362, it was said that section 633 of the Code of Civil Procedure "requires the court, in giving the decision, to state the facts found and the conclusions of law separately, and provides that after the decision has been given judgment must be entered accordingly. The judgment which is to be entered upon the decision is the sentence of the court in conformity with the conclusion of law, and must find its basis therein"; and it was further said that "they (the conclusions of law) may be changed by the court any time prior to the entry of judgment." (Citing *Condee v. Barton*, *supra*; *Crim v. Kessing*, *supra*. See, also, *In re Cook*, 77 Cal. 229; 11 Am. St. Rep. 267, where *Condee v. Barton*, *supra*, is cited.)

I do not find any case in this state where the question as to the power of the court to change or add to its conclusions of law after the entry of the judgment has been expressly decided; but the language used in the cases above cited, inferentially at least, limits the power of the court in this regard to a period which expires with the entry of the judgment. In *Egan v. Egan*, 90 Cal. 21, it was said: "It clearly appears in the present case that the matter contained in the amendment made by the order appealed from was not omitted from the judgment by reason of any neglect of the clerk in recording the same, but was intentionally excluded therefrom by the court itself at the time it rendered the judgment. If it should be admitted that the court ought to have included the provisions of this stipulation in its decree, its failure to do so was an error re-

sulting either from a misconception of the law applicable to the facts before it, or from a failure to give sufficient consideration to those facts. In either case it was an error of law committed at the trial, which the defendant should have sought to remedy through her motion for a new trial."

The principle there decided, we think, is conclusive of the question under consideration. This conclusion, however, is strongly supported by the case of *Forquer v. Forquer*, 19 Ill. 71, where it was said: "This was not a clerical mistake of the clerk in entering up the decree which was rendered by the court, but was an error of the court in rendering the decree, which should be reversed on error. There is nothing to show that the court noticed the prayer of the bill, that the rights of the widow, in the lease, should be reserved to her in the sale to be made of the premises, and that the judge intended to reserve such right in the decree. The draft of the decree was drawn by the complainants' solicitor, and he swears that he inadvertently omitted to insert the saving clause, according to the prayer of the bill. The presumption is, that the court inspected the draft thus drawn, and pronounced it as the decree of the court without critically comparing it with the bill, and hence was inadvertently led into the error which undoubtedly exists in the decree. The clerk correctly copied into the record the draft of the decree as it was rendered. If the judge's minutes showed that there was a saving clause, we might presume that the draft prepared by the solicitor did not express the whole of the decree, and that the clerk had, by mistake, omitted to enter the saving clause in the decree, when the amendment might have been authorized by the statute of jeofails, but there is nothing to show that the court had an intention to insert such saving clause. This, then, was clearly a judicial, and not a clerical, error, which can only be corrected in this court."

We cannot say that the omission of the court to dispose of the water stock by the decree was not prejudicial

to appellant, and, as it was clearly erroneous, the motion for a new trial should have been granted. The amendment of the order for judgment and the amendment of the judgment itself, being unauthorized and beyond the jurisdiction of the court, and therefore void, did not change the situation. If the motion for new trial should have prevailed, the amendment not having been made, it should have been granted notwithstanding the amendment.

But, as the pledge of the water stock was admitted by the answer, the stock should have been included in the order for judgment and in the judgment and order of sale.

The cause should be remanded, with directions to the court below to amend its order for judgment and the judgment therein so as to include said water stock in the order of sale, and directing that said water stock shall be first sold, unless the defendant shall otherwise direct; and the judgment as so amended should be affirmed, appellant to recover his costs on this appeal.

**BRITT, C., and SEARLS, C., concurred.**

For the reasons given in the foregoing opinion it is ordered that this cause be remanded to the court below, with directions to modify the judgment so as to include said water stock in the order of sale, and, as so modified, the judgment be affirmed, appellant to recover his costs on this appeal.

**McFARLAND, J., TEMPLE, J., HENSHAW, J.**



[No. 15697. In Bank.—November 14, 1895.]

**JAMES O. MCCRATH, APPELLANT, v. GEORGE L. CARROLL ET AL., EXECUTORS, RESPONDENTS.**

**ESTATES OF DECEASED PERSONS—TRUST—PRESENTATION OF CLAIM.—**

While equity will enforce a trust against the personal representatives of a deceased person without a presentation of a claim against the estate, when the identical trust property or its product in a new form can be traced into the estate, and so into the possession of the representatives of the decedent, yet a beneficiary who is unable to do this must rely on the personal liability of the trustee, and has only a claim against the estate which must be duly presented for allowance.

**ID.—TRUST CLAIM—WHEN LIMITATION BEGINS TO RUN.—**Where a trust claim has not been repudiated during the lifetime of the trustee, the statute of limitations is set in motion from the time of the first publication of notice to creditors.

**ID.—PRESENTATION OF TRUST CLAIM—MONEY DEMAND—STATUTE OF LIMITATIONS.—**The fact that the beneficiary is obliged to present his claim as a general creditor against the estate of a deceased person does not change the nature of his demand, which is still one for property due under a trust accounting, but merely changes his remedy; and in presenting such claim, in order to avoid the statute of limitations, he must set forth in the claim the facts constituting the trust, and that the trustee did not repudiate the same to the knowledge of the beneficiary; but where the claim as presented is of a mere money demand which is barred upon its face by the statute of limitations, it is the duty of the executors to reject the claim, and the claimant cannot prevent the bar of the statute by setting forth a trust claim in his complaint.

**ID.—PLEADING—VARIANCE—ABATEMENT—LIMITATIONS.—**In an action upon a claim presented against the estate of a deceased person the complaint should conform to the statement of the claim as presented, and where the claim presented is a mere money demand which is upon its face barred by the statute of limitations, by reason of there being no hint of a trust therein, and the complaint contains for the first time an allegation of a trust not included in the claim, the defendant may plead the statute of limitations against the rejected claim, and may also plead the variance, and the nonpresentation of the trust claim in abatement of the action.

**APPEAL—REVIEW—REASONS FOR DECISION.—**Upon an appeal the reasons for the decision of the trial court are immaterial, if the conclusion reached is justifiable, and the judgment will be affirmed if it is right upon any ground.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. **JOHN HUNT,** Judge.

The facts are stated in the opinion of the court.

*Young & Powers*, for Appellant.

There being no evidence of a repudiation of the trust claim, it should be enforced against the estate with interest out of the assets. (*Lathrop v. Bampton*, 31 Cal. 21; 89 Am. Dec. 141; Perry on Trusts, secs. 345, 843; Civ. Code, secs. 2228-39.) When a trustee uses trust funds for his own benefit he is liable for interest. (*Estate of James Holbert*, 39 Cal. 597; *Estate of McQueen*, 44 Cal. 589.)

*Garret W. McEnerney*, for Respondents.

The claim being for money had and received was barred in two years. (*Estate of Galvin*, 51 Cal. 215; *Dorland v. Dorland*, 66 Cal. 189.) The statutes of limitations are regarded with favor. (Wood on Limitations, 2d ed., 7, 8.)

HENSHAW, J.—Appeal from the judgment, taken within sixty days from its rendition. The evidence is brought up for review by bill of exceptions.

Plaintiff presented his claim to the executors of the estate of R. T. Carroll, deceased, which claim was in form as follows:

“The undersigned, creditor of the estate of R. T. Carroll, deceased, presents his claim against the estate of said deceased, with the necessary vouchers, for approval, as follows, to wit:

“Estate of R. T. Carroll, Deceased,

“To James O. McGrath, Dr.”

The following are the particulars of said creditor's claim:

“SAN FRANCISCO, March 20, 1891.

“Estate of R. T. Carroll, Deceased,

“To James O. McGrath.

1879.

Dec. 18. By check ..... \$1,000 00

Interest from date at 7 per cent per

annum, 11 years and 90 days..... 787 26

1881.		
May 17.	By cash .....	600 00
	Interest from date at 7 per cent per annum, 9 years and 304 days.....	412 98
1882.		
Sept. 19.	To amount of judgment received in suit, <i>McGrath vs. St. Lawrence Mining Co.</i> .....	600 00
	Interest from date at 7 per cent per annum, 8 years and 181 days.....	356 83
		<hr/>
		\$3,757 07
1889.	Cr.	
July 13.	Fees to attorney, etc.....	\$ 30 60
1890.		
Jan. 11.	Judgment in <i>Cowper vs. McGrath</i> .....	800 00
	Interest from date at 7 per cent per annum from date to March 11, 1891...	66 00
1890.		
Dec. 23.	Fees to attorney, etc.....	30 00    926 60
		<hr/>
		\$2,830 47"

The claim was rejected and in due time thereafter the plaintiff commenced this action. By his complaint he set up that the moneys were received and held by deceased "in trust for the use and benefit of plaintiff." The nature and terms of the trust are not, however, disclosed. The defendants by demurrer and by answer pleaded the statute of limitations.

When the evidence had been received the court instructed the jury to render a verdict for defendants, which it did, and judgment was entered accordingly.

In so doing the court said: "Of course, if the property was received in trust, then the statute never runs as long as the trust exists and the relation continues; and it would not run until some repudiation of the trust

made by the trustee was brought home to the knowledge of the trustor.

"Treated as a simple money demand it would clearly be barred on its face, inasmuch as the party did not commence a suit while Carroll was alive, but until after he died.

"In the case of *Lathrop v. Bampton*, 31 Cal. 24, 89 Am. Dec. 141, treating this as an action in trust, and assuming that a trust was created, and if the jury believe the evidence of that witness that a trust was created, nevertheless the testimony of Mrs. Carroll that this property has not come to her or been received by her is a failure to follow it up and identify it under the rule laid down in *Lathrop v. Bampton*, *supra*, which says: 'The identity of a trust fund consisting of money may be preserved so long as it can be followed and distinguished from all other funds. If there was any trust fund here, it consisted of money.' The decision further says: 'Not by identifying the individual pieces or coins, but by showing a separate and independant fund or value, readily distinguishable from all other funds.' That has not been done. You sued to enforce a trust. You have presented a demand and claim against the estate, and that makes your cause of action. You have sued to enforce a trust in relation to money; and you have not followed the trust fund into the hands of the defendants, nor its proceeds, and place it solely upon that ground."

The judgment of a trial court does not depend for its sufficiency upon the reasoning by which it is reached. The opinion of the judge may be erroneous, while the conclusion arrived at and given expression in the judgment may be just and sound.

So here the ground upon which the court rested its decision is immaterial if the conclusion reached was the only one justifiable. Moreover, the language of the judge indicates an appreciation of the situation of the parties, and we are inclined to believe that it fails to give a full exposition of the principles involved, not from oversight, but because of the lack of opportunity

for careful preparation and presentation which must always embarrass a judge in the swift progress of a trial.

*Lathrop v. Bampton, supra*, holds that equity will enforce a trust against the personal representatives of a deceased trustee, and *without the presentation of a claim against the estate*, when the identical trust property or its product in a new form can be traced into the estate and so into the possession of the representatives. But a beneficiary who is unable to do this must rely on the personal liability of the trustee, and so relying has only a claim against the estate which must be duly presented for allowance.

But such a claim is still based upon the trust, whatever that may have been. It has its origin in the trust, and depends for its validity upon the legality and sufficiency of the trust. The fact that the beneficiary is obliged to present his claim and look like a general creditor to the assets of the estate for payment, does not change the nature of his demand, which is still one for property due under a trust accounting; it merely has changed his remedy.

In an express trust the statute of limitations is not set in motion against the beneficiary during the term of its existence, unless the trustee has in some unequivocal way, with notice to the beneficiary, repudiated the trust. If, during his lifetime, the trustee has not done this, his death will not be held to be such a repudiation. The rights of the beneficiary remain unaffected by this event; his remedies, however, will depend upon his ability or inability to trace the specific trust property.

When, as here, he is obliged to look to the general assets and to present his claim, in the absence of repudiation, the statute of limitations is set in motion from the time of the first publication of the notice to creditors.

No action can be brought by the holder of such a claim unless it be first presented (Code Civ. Proc., secs. 1493, 1500), and every claim must sufficiently indicate the nature and amount of the demand to enable the executor and judge in probate to act advisedly upon it.

(*Henderson v. Ilsley*, 11 Smedes & M. 11.) As no holder of a claim may maintain an action upon it unless it has first been presented, it follows as a necessary sequence that the only action the holder may maintain is one founded upon the claim presented. (*Lichtenberg v. McGlynn*, 105 Cal. 45.)

In this case the claim presented was a simple demand for money lent, accompanied by a demand for legal interest, with which such moneys are charged. No hint or suggestion is made of a trust, and the debts set out were all long barred by the statute of limitations. Upon such a claim the executors had no discretion. Their plain duty was to reject it as they did. (Code Civ. Proc., sec. 1499.)

In the complaint for the first time there is a plea of trust (without disclosure of its terms even then), and the defendant executors are compelled to meet a cause of action unsupported by the claim presented, and a claim founded thereon which had never been presented and upon which they had never been called to pass.

They did this by pleading the statute of limitations, which was a good plea directed against the rejected claim that plaintiff was compelled to set forth in his complaint. They might also have pleaded the variance and nonpresentation in abatement, but, under the circumstances, we are of the opinion that the point is sufficiently presented by the plea of the statute, and this seems to have been in the mind of the court when it said: "Treated as a simple money demand, it would clearly be barred on its face, inasmuch as the party did not commence a suit while Carroll was alive, but until after his death. . . . You have presented a demand and claim against the estate, and that makes your cause of action."

For the foregoing reasons the judgment appealed from is affirmed.

McFARLAND, J., VAN FLEET, J., HARRISON, J., BEATTY, C. J., and GAROUTTE, J., concurred.

[L. A. No. 127. In Bank.—November 14, 1895.]

**GEORGE W. TERRY, PETITIONER, v. THE SUPERIOR COURT OF THE COUNTY OF SAN DIEGO, RESPONDENT.**

**ACTION AGAINST MARRIED WOMEN—ASSUMPSIT—STATUTORY OBLIGATION—PLEADING—JUDGMENT.**—An action against married women upon a contract for services rendered by undertakers in the burial of their father at their instance and request is an action of *assumpsit* to enforce a voluntary agreement, and not to enforce a statutory obligation against the wives under section 292 of the Penal Code, if no facts are stated in the complaint respecting such statutory obligation; and the judgment in such action can bind only the wives and their separate property.

**ID.—JUSTICE'S COURT—RULES OF PLEADING—PROOFS—JUDGMENT.**—However liberal the rules of pleading may be in a justice's court, the complaint must state the cause of action relied upon, and in that, as in every court, the allegations and proofs must correspond, and the judgment must be upon the demand and within the pleadings.

**ID.—JUSTICE'S COURT—HUSBANDS AS PARTIES—APPEAL—SERVICE OF NOTICE—JURISDICTION OF SUPERIOR COURT.**—In an action in the justice's court to enforce an *assumpsit* for services rendered at the special instance and request of married women, where the judgment rendered is not in terms against their husbands or the community property, but, in contemplation of the pleadings, is a judgment whose satisfaction can only be had from the separate property of the wives, the husbands are not parties adverse to their wives upon an appeal taken by the wives to the superior court; and the notice of appeal need not be served upon them as adverse parties in order to give jurisdiction to the superior court of the appeal, and its jurisdiction to determine the appeal cannot be restrained by writ of prohibition for want of such service.

**APPLICATION** in the Supreme Court for a writ of prohibition to restrain the Superior Court of San Diego County from hearing an appeal from the Justice's Court of San Diego Township. **GEORGE PUTERBAUGH, Judge.**

The facts are stated in the opinion of the court.

*Aitken & Smith*, for Petitioner.

*A. C. Mouser*, for Respondent.

The defendants not served with the notice of appeal were not adverse parties within the meaning of section 974 of the Code of Civil Procedure. Every party whose interest in the subject matter of the appeal is adverse to,

or will be affected by, the reversal or modification of the judgment or order from which the appeal has been taken, is an adverse party. (*Lancaster v. Maxwell*, 103 Cal. 68; *Senter v. De Bernal*, 38 Cal. 640; *Harper v. Hildreth*, 99 Cal. 267; *Hinkel v. Donohue*, 88 Cal. 598; *Latham v. Los Angeles*, 83 Cal. 565; *Millikin v. Houghton*, 75 Cal. 541; *Randall v. Hunter*, 69 Cal. 82.) The only object in requiring the husband to be joined with the wife in a suit against the latter, under section 370 of the Code of Civil Procedure, is that he may have an opportunity to make a defense on her behalf, and not for the purpose of binding his property by the judgment. (*McComb v. Spangler*, 71 Cal. 425.)

THE COURT.—This is an application for a writ of prohibition to restrain the superior court of San Diego county from hearing an appeal from the justice's court of San Diego township.

An action was brought in the justice's court of San Diego township by George W. Terry, petitioner herein, as plaintiff, against W. H. Dinwiddie and Harriet M. Dinwiddie, his wife, Robert Daly and Rebecca A. Daly, his wife, Visa J. Cline, Charles Morris, and Josephine Morris, his wife. No service of summons was had upon the defendants Morris and Cline, nor did they appear. The Dinwiddies and Dalys were served with summons and answered.

The action was upon a claim of Johnson & Co., undertakers, assigned to plaintiff, and was for services rendered by said undertakers in the burial of C. Breedlove, father of the women defendants, and of C. W. Breedlove, their brother, at their instance and request. Their husbands were joined as party defendants under the provisions of the code.

The judgment given in the justice's court was in favor of plaintiff, against defendants Harriet M. Dinwiddie and Rebecca A. Daly. No judgment in terms was asked or given against their husbands, or either of them.

From this judgment the defendants Harriet M. Din-



widdie and Rebecca A. Daly gave notice of appeal to the superior court. The cause being transferred to that forum, a motion was there made by plaintiff (petitioner herein) to dismiss the appeal, upon the ground that the superior court had no jurisdiction to entertain the same, for that the notice of appeal had not been served upon defendants W. H. Dinwiddie, Robert Daly, Charles and Josephine Morris, and Visa J. Cline.

The motion was decided adversely to plaintiff, and, the court retaining said appeal, this writ is sought to restrain it from proceeding further in the matter.

The superior court, in passing upon the motion, was not called upon to decide any controverted question of fact. The undisputed facts were that plaintiff was served with notice of appeal, and that the defendants Morris, Cline, W. H. Dinwiddie, and Robert Daly were not. The duty devolving upon the court was to determine, from the record upon appeal, whether the defendants not served, or any of them, were adverse parties to the appellants. (*Harper v. Hildreth*, 99 Cal. 265.)

The decision of the court upon the motion, by which ruling it retained the appeal, was not erroneous.

Adverse parties are those who, by the record, appear to be interested in the judgment, so that they will be affected by its reversal or modification. So far as concerns the defendants, Morris and Cline not having been served with summons, and not having appeared, they are not parties litigant to the judgment, and are neither friendly nor adverse upon appeal. It was not incumbent that they should be served. (*Hinkel v. Donohue*, 88 Cal. 598; *Merced Bank v. Rosenthal*, 99 Cal. 42.)

As to the husbands of appellants, their *status* in the controversy is to be determined, as has been said, by reference to the record. By this it appears that the action was upon an express contract alleged to have been made, not by them, but by their wives—a judgment upon which would bind only the wives and their separate property. If, as was claimed upon argument, the action was prosecuted to enforce, not a voluntary

agreement, but a statutory obligation against the wives, under section 292 of the Penal Code, a judgment for which could be enforced against the community property, it need only be said that, however liberal the rules of pleading may be in a justice's court, nevertheless a cause of action must there be stated, and it must be the cause of action relied on, for in that, as in every court, the *allegata* and *probata* must correspond, and the judgment must be upon the demand, and within the pleadings. Plaintiff charged upon no statutory obligation; there is an entire absence of averment necessary to such charge; but he did sue in *assumpsit*, averring the performance of services at the special instance and request of the defendant wives.

Under such a complaint the husbands in the original action became proper and necessary parties defendant. Not, however, to the end that they or their property should be bound by the judgment, but solely that they might be able to aid their wives in their defense. The present utility of the statute in this progressive day may be open to question, but, however this may be, it was passed at a time when the lawmakers, perhaps with mistaken chivalry, believed that a wife brought into litigation might be the better for the comfort, protection and support of her husband's authorized presence, and in any event determined to secure it to her.

Nor was the judgment of the justice's court, in terms, against the husbands or the community property. In contemplation of the pleadings it was a judgment whose satisfaction could be had from the separate property of the wives alone.

Under such a condition of the record it is impossible to regard the husbands as parties adverse to their wives upon this appeal. Their interest in the judgment, and in its reversal or modification, is identical in kind and character with the wives' interest; they are in court, in contemplation of law as well as in fact, to assist their wives and not to oppose them, and in this appeal they occupy no position adverse or hostile to them.

It was therefore not necessary that the husbands should have been served with notice of appeal as "adverse parties," and this is all the superior court was called upon to decide in passing upon the motion to dismiss. By the appeal of the wives as taken that court obtained jurisdiction of the action. If, upon trial, it should believe it proper that the husbands should again be called in under section 370 of the Code of Civil Procedure, it would, on proper showing, make an appropriate order to that effect. But the necessity for such action is not here under consideration.

The application for a writ of prohibition is denied.

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[No. 18329. Department Two.—November 18, 1895.]

**GEORGE PETERS, RESPONDENT, v. ANNIE L. DE  
ROSE GRACIA ET AL., APPELLANTS.**

**PARTITION FENCE—LOCATION OF BOUNDARY—CONFLICTING EVIDENCE.—**

Where there is conflicting evidence as to whether a partition fence was constructed upon the line of an old fence constituting a partition boundary, which had been destroyed by a freshet, or whether the new fence was rebuilt further north than the true line, a finding that it was not rebuilt upon the line of the old fence, but was rebuilt a few paces further north, within the exterior limits of a specified survey, will not be disturbed upon appeal.

**ID.—PROOF OF SURVEY—FAULTY METHOD—ASCERTAINMENT OF BOUNDARY**

—SUPPORT OF FINDING.—Where a survey of the boundary line in dispute, which pursued a faulty method of ascertaining the boundary by not commencing at the proper starting point, is admitted in evidence without objection, it becomes evidence, though apparently not the best, of the location of the line in the place claimed by the plaintiff, and a finding of the court in accordance therewith is supported by the evidence.

**ID.—MISLOCATION OF PARTITION FENCE—STATUTE OF LIMITATIONS—AD-**

VERSE POSSESSION.—Where it is proven that an agreement existed between the owners of adjoining surveys that the land upon which a fence and ditch was located belonged to one of them, and that his land in fact extended further south than the fence and ditch, and that a joint survey would be made to fix the true line, the possession of the other owner to the fence and ditch is not adverse, and the statute of limitations does not run against the true owner.

**ID.—DECLARATIONS OF ADJOINING OWNERS—STATEMENTS OF DECEASED**

PERSONS—CREDIBILITY OF WITNESSES.—Evidence of the declarations of adjoining owners made long prior to the commencement of

the action, some of which were made by deceased persons, for the purpose of showing that it was understood between the adjoining owners that a fence between them was not upon the true partition line is admissible, although it is a just caution addressed to the trial court that there is danger of relying upon the declarations of deceased persons when it becomes impossible of contradiction; but the credibility of such evidence is for the consideration of the judge of the court who saw and heard the witnesses.

**APPEAL** from a judgment of the Superior Court of the County of Sacramento and from an order denying a new trial. A. P. CATLIN, Judge.

The facts are stated in the opinion of the court.

A. L. Hart, and A. C. Hinkson, for Apellants.

The survey relied upon by plaintiff was faulty, in that it started at a monument in another and independent survey, numbered 173, lying north of plaintiff's land, and ran to the south, determining the southern boundary line of plaintiff's land by reference to courses and distances and quantity. (*Black v. Sprague*, 54 Cal. 266; *Gordon v. Eooker*, 97 Cal. 586; *Anderson v. Richardson*, 92 Cal. 623; *Blackburn v. Nelson*, 100 Cal. 336; *Harkins v. Nelson*, 53 Cal. 316.) The court erred in overruling the objection of the defendant and permitting the witness Vincenzo Casselli to testify to a conversation with one Miss Ross, in which Miss Ross told him that the fence was all on her premises, and in denying defendants' motion to strike out the witness' testimony upon that subject. (*Morton v. Folger*, 15 Cal. 279; *Davis v. Davis*, 26 Cal. 23; 85 Am. Dec. 157.) Acquiescence by an owner of land, manifested by silent assent or submission with apparent consent, for a period of upwards of five years, in the location of a fence as the dividing line between his land and that of the adjoining proprietor, operates to estop him from questioning the correctness of the location. (*Burris v. Fitch*, 76 Cal. 395; *Helm v. Wilson*, 76 Cal. 476.)

**Armstrong & Bruner, and McKune & George, for Respondent.**

THE COURT.—There are four certain swamp land surveys in Sacramento county which are numbered, respectively, and extend in a continuous chain along the east bank of the Sacramento river from south to north, in the following order: 147, 165, 282, and 173. The tracts 147, 165, and 173 were surveyed in the year 1858, and tract 282 in 1859; all under the act of April 21, 1858, providing for the sale, etc., of swamp and overflowed lands. (Stats. 1858, p. 198.) By section 11 of that act surveys of lands held by actual settlers were required to conform to the lines and boundaries established by such settlers. This action—begun April 23, 1892—is prosecuted by plaintiff, the present owner of said survey 282, to quiet his alleged title to a strip of land lying along the common boundary of said surveys 282 and 165—the north line of 165 and the south line of 282. Defendants own said tract 165, and the question involved relates to the true location of said common boundary. At the time said surveys were made it seems that one Watson was a settler on tract 165, and one Angus Ross on tract 282; patents from the state for the lands were issued in course; in the year 1861 one Casselli became the owner of the land in survey 165; about 1869 he conveyed the same to the brothers Gracia—Joseph and Manuel; upon the death of both of them, a few years before the commencement of this action, their title passed to the defendants; survey 282 was owned in 1861 by a person designated in the record as Miss Ross; she conveyed it to plaintiff in 1865. Of the four parcels mentioned No. 147 was first surveyed; then the northwest corner of such tract 147 was adopted as the initial point for the survey of 165; thence the east bank of the river was meandered northerly, as the field notes show, “to a stake on the levee at the end of a partition fence dividing Watson and Ross’ land”; and thence the line, now in dispute, quitting the river ran “with said fence south 84 degrees, 30 minutes, east 65.39 chains,” etc. When tract 282 was surveyed the starting point adopted was the northwest corner of sur-

vey 165, viz., the stake at the end of said partition fence. At present a fence and ditch serve, and for many years have served, to delimit the possession of the two tracts and these are claimed by defendants to be substantially on the line of the partition fence of 1858. The court found, however, that the old fence was destroyed by the freshet of 1861-62, which devastated that region, and was rebuilt a few paces further north within the exterior limits of survey 282. From this fact, and other evidence, the court concluded that the true boundary is a little to the southward of the existing fence and ditch, and, overruling also the defense of the statute of limitations interposed by defendants, gave judgment awarding the land in dispute to plaintiff.

As to whether the fence which divided the two ranches was moved from the line it occupied in 1858, the evidence was sharply conflicting. Said Casselli testified positively that Miss Ross rebuilt it, soon after the flood of 1861-62, four or five paces further north than it stood originally; there was also evidence of parol admissions by Casselli while he owned survey 165, and also by the Gracia brothers while they held the title, that the land of plaintiff extended south of the then existing fence and ditch. True, there was testimony tending to disprove this theory, and some circumstances appear which, on the record as presented to us, do not accord well with that view; but the resolution of such conflict by the trial court cannot be disturbed here.

The original monument which marked the boundary between the two parcels being thus displaced, it became necessary to ascertain such boundary by other means; for this purpose a survey, made some months before the trial, was admitted in evidence (without objection), which took as its starting point a monument in the boundary between tracts 282 and 178—the north line of plaintiff's land. The natural and obvious mode of ascertaining the disputed line was, it would seem, by first determining the location of the northwest corner of survey 147, the initial point of the original survey of No.

165, and thence running the lines of 165 according to the original field-notes; for the south line of No. 282 was by the survey of 1859 made coincident with the previously established north line of 165. It was not proved that the northwest corner of 147 cannot be located from existing data. The late survey reversed the course suggested, and pursued a faulty method (*Blackburn v. Nelson*, 100 Cal. 336); one which would make good mistakes and imperfections, if any, in the original survey of tract 282 at the expense of the south line of that tract, when in fact that line was, relatively to the others, fixed and controlling; but, being received, it was evidence, though apparently not the best, of the location of the line in the place claimed by plaintiff, and the finding of the court in accordance therewith is not without support; it is countenanced also by the evidence of removal of the old fence.

We do not think that the court erred in overruling the objection to the testimony of Casselli that in 1861, when he owned survey 165, Miss Ross, who then was owner and in possession of survey 282, told him that the fence was all on her premises. This, together with the whole conversation stated by the witness, was admissible as tending to show that the owners of survey 165 held in subordination to the claim of the owners of survey 282 that the latter extended between the fence, and with the understanding that the true line was to be afterward ascertained.

The evidence showed actual occupation of the premises in controversy by defendants and their predecessors in interest for a period of more than thirty years. But the court found that, up to a time within five years before the commencement of this action, it was well understood by defendants and their predecessors that the true division line between the two tracts was to be ascertained by a survey, and that until recently their possession was not adverse to the plaintiff. It was in evidence that an agreement existed first between Casselli and Miss Ross, then between Casselli and plaintiff,

afterward between plaintiff and the Gracia brothers, that the plaintiff's land extended somewhat farther south than the fence and ditch, and that a joint survey would be made to fix the line. In such a case the statute of limitations does not run. (*Irvine v. Adler*, 44 Cal. 559; *Quinn v. Windmiller*, 67 Cal. 461.)

A good deal of evidence of statements made by deceased persons many years ago appears in the record; for example, those of the Gracia brothers, to the effect that they did not claim the existing fence and ditch to mark the true line of their land; and appellants strongly urge the danger of relying upon this species of evidence when it becomes impossible of contradiction. The caution is just, but it addresses itself mainly to the trial court; in this instance the learned judge of that court saw and heard the witnesses, and their credibility was for his consideration; moreover, he made a personal inspection of the disputed boundary, and we cannot say that his conclusions from the matters before him should have been different.

The judgment and order are affirmed.

Hearing in Bank denied.

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[No. 18337. Department Two.—November 18, 1895.]

COUNTY OF SISKIYOU, RESPONDENT, v. CHARLES  
GAMLICH, APPELLANT.

HIGHWAY—CONDEMNATION OF RIGHT OF WAY—PLEADING—MORE PRACTICABLE ROUTE—INSUFFICIENT ANSWER.—In an action by a county to condemn a right of way for a public highway over the lands of defendant, by a route determined upon by the board of supervisors upon approving the report of viewers of the road, affirmative matter in the answer setting up a petition for a road over a different route, upon which other viewers had reported favorably, but which the board of supervisors had rejected and refused to grant the prayer of the petition, and that the route so petitioned for forms a more direct and practicable route, and of cheaper construction than that set up in the complaint, is insufficient to constitute a defense to the action, and is properly stricken out.



**Id.—JURISDICTION OF BOARD OF SUPERVISORS—APPROVAL OF REPORT OF VIEWERS—COLLATERAL ATTACK.**—The board of supervisors has jurisdiction to determine whether a new road is necessary or not, and, if necessary, over what route it shall be laid out and constructed; and, in laying out a public road, the board exercises judicial functions, and its order approving the report of viewers cannot be collaterally attacked on the ground that it was made upon insufficient evidence.

**Id.—EVIDENCE—PETITION FOR ROAD—TESTIMONY OF SUPERVISOR—FINDING AS TO QUALIFICATION OF PETITIONER—COLLATERAL ATTACK.**—The petition upon which the road was established by the supervisors is admissible in evidence, and the testimony of one of the supervisors is admissible to identify the petition as the one presented to and acted upon by the board, and, if it sets forth that the parties who signed it were all freeholders of the road district, and taxable therein for road purposes, the action of the board in establishing the road is conclusive that the statements in the petition were found to be true as to the qualification of the petitioners as against a collateral attack.

**Id.—SUFFICIENCY OF PROOF—NONSUIT.**—In an action to condemn a right of way for a road, a *prima facie* case is established by proving the presentation of a regular petition to the board of supervisors with a good and sufficient bond, the record of the board showing the appointment of viewers, the report of the viewers in proper form, and its approval, the assessment of damages, and the setting apart out of the proper fund of the money awarded defendant, his refusal for ten days to accept the same, and the order to commence suit for condemnation, and, when these facts are proved, a motion for a nonsuit is properly denied.

**Id.—RECORD OF SUPERVISORS—ABSENCE OF FINDING—PRESUMPTION OF REGULARITY—BURDEN OF PROOF.**—The mere absence from the record of the board of supervisors of an affirmative finding that the board approved the bond, and found that the signers of the petition were freeholders within the road district, does not prove that they did not so find; but the presumption is in favor of the regularity of the action of the board, and the burden is on the defendant to show affirmatively the contrary.

**Id.—INADMISSIBLE EVIDENCE—BETTER ROUTE.**—An offer of the defendant to prove a shorter and more practicable route than the one sought to be condemned is properly rejected as inadmissible.

**Id.—AGE OF PETITIONERS—PROOF BEFORE SUPERVISORS.**—Where there is no suggestion or claim that any of the signers to the petition were minors, proof of their age or ages before the board of supervisors is not required, and testimony as to whether the board took or heard any evidence as to their age or ages is properly excluded.

**Id.—PROOF OF DAMAGES—TESTIMONY OF SUPERVISORS.**—The supervisors who acted upon the petition are competent as witnesses to testify as to the damages sustained by the defendant, and their testimony cannot be rejected upon the ground that their records are the best evidence of their determination as to damages.

**AMENDMENT OF ANSWER—DISCRETION OF COURT.**—An application for leave to amend an answer by adding a denial thereto is addressed to the sound legal discretion of the trial court; and its action in refusing to allow the amendment will not be disturbed, unless it appears that it abused its discretion, and that the defendant was prejudiced thereby.

APPEAL from a judgment of the Superior Court of Siskiyou County, and from an order denying a new trial. J. S. BEARD, Judge.

The facts are stated in the opinion.

*James F. Farraher*, for Appellant.

The court erred in striking out the affirmative defense set up in defendant's answer, as it sets up new matter which, if true, would have defeated the action. (Code Civ. Proc., sec. 437; *Pasadena v. Stimson*, 91 Cal. 259.) The court erred in admitting the petition to the board of supervisors in evidence, as the jurisdictional facts giving the board power to act upon the petition were not proven, and the law will not presume that they existed. (Code Civ. Proc., secs. 456, 1241, 1244; *In re Madera Irr. Dist.*, 92 Cal. 335; 27 Am. St. Rep. 106; *Pacific Paving Co. v. Bolton*, 97 Cal. 9.) The court erred in ruling against defendant's offer to prove the existence of a shorter and more practicable route, and better in every way, than was the route condemned. (*Pasadena v. Stimson*, *supra*; Pol. Code, secs. 2681-86.) Evidence as to the qualifications of signers of the petition was both competent and material. (*In re Grove Street*, 61 Cal. 453; Code Civ. Proc., sec. 1963, subds. 15, 16, and cases cited.)

*James F. Lodge*, and *R. S. Taylor*, for Respondent.

It was the province of the board of supervisors to pass upon the practicability of, and the public necessity for, the road, and their findings in these particulars were conclusive. (Pol. Code, sec. 2690; *Tehama County v. Bryan*, 68 Cal. 63; *Sherman v. Buick*, 32 Cal. 253; 91 Am. Dec. 577; *Humboldt County v. Dinsmore*, 75 Cal. 607-9.) They (the board) were acting in a judicial capacity, and such action cannot be assailed collaterally. (*Damrell v. San Joaquin County*, 40 Cal. 158; *Los Angeles County v. San Jose etc. Water Co.*, 96 Cal. 94; *Butte County v. Boydstun*, 68 Cal. 189.) The court did

not err in refusing to allow the appellant his proposed amendment to his answer. It was in the discretion of the court. (Code Civ. Proc., sec. 473.)

BELCHER, C.—This is an action for the condemnation of a right of way for a public highway over the lands of defendant. The complaint alleges that the required petition in writing for laying out a new road, signed by at least ten freeholders of the road district in which defendant's lands are situated and taxable therein for road purposes, was presented to the board of supervisors; that the necessary accompanying bond was filed and approved by the board; that three viewers were appointed, one of whom was the county surveyor, and that two of the viewers proceeded to view, survey and lay out said proposed road; that they filed their report, showing the course, termini, length, width, and probable cost of the road, with the names of the landowners who did not consent and the amount of damages claimed by each, and recommended its construction; that defendant would be damaged by the location and opening of the route so established in the sum of ten dollars as reported by the viewers, and that the right of way over defendant's lands was necessary for the creation of said highway; that the board approved the report, but defendant refused to accept the damages awarded him, and thereafter an order was regularly made and entered by the board directing the district attorney of the county to institute this action.

The answer denies most of the averments of the complaint, and then, as an affirmative defense, alleges that, while the hearing of the petition referred to in plaintiff's complaint was pending, a petition, signed by ten freeholders residing within the road district and taxable therein for road purposes, was filed with the board of supervisors, asking for the opening up of a road over a different route from the one set out in the complaint; that the petition was accompanied by a good and sufficient bond, which was approved by the board and filed,

and that viewers were thereupon appointed to view the proposed route and report thereon; that the viewers thereafter reported favorably upon said route, and recommended that it be declared a public highway; that the board rejected said report and refused to grant the prayer of said petition; that the route so petitioned for forms a more direct and practicable route and of cheaper construction than that set out in the complaint, and will serve all the purposes, and subserve the interests of the general public, much better than the other one.

The case was tried by the court, without a jury, and judgment of condemnation was entered as prayed for in the complaint, from which, and from an order denying a new trial, defendant appeals.

1. At the commencement of the trial counsel for plaintiff moved the court to strike out from defendant's answer the alleged affirmative defense set out therein, and the motion was granted. This ruling is assigned as error, but we think it proper. The facts set up in that part of the answer stricken out did not constitute a defense to the action. It was for the board of supervisors to determine whether a new road was necessary or not, and, if necessary, over what route it should be laid out and constructed. (Pol. Code, secs. 2681-90.) In laying out a public road, the board of supervisors exercises judicial functions, and its order approving the report of the viewers cannot be collaterally attacked on the ground that it was made upon insufficient evidence. (*Damrell v. San Joaquin County*, 40 Cal. 154; *Humboldt County v. Dinsmore*, 75 Cal. 604; *Los Angeles County v. San Jose etc. Water Co.*, 96 Cal. 93.)

2. Plaintiff offered in evidence the petition presented to the board of supervisors, and defendant objected to its reception on the ground that the parties who signed it were not shown to be taxpayers and taxable in the road district, and on the further ground that it had not been identified or proved to be the petition presented. The plaintiff then called as a witness Supervisor Jackson, and asked him to state whether or not the board of

supervisors took action upon the petition shown him. Defendant objected to this question on the ground that it was incompetent, and that the minutes of the board were the best evidence of the action taken. Both objections were overruled, and these rulings are assigned as errors.

The evidence of the witness Jackson was clearly admissible to identify the petition offered in evidence as the one presented to and acted upon by the board. In the petition the petitioners state that "we are, each and all, freeholders" of the road district, "and taxable therein for road purposes." The action of the board shows that this statement must have been found to be true, and, for the purposes of this case, under collateral attack, the finding must be held conclusive. There was, therefore, no error in admitting the petition in evidence.

3. The defendant's motion for nonsuit was properly denied. To make out a *prima facie* case it was only incumbent upon the plaintiff to prove the presentation of a regular petition to the board of supervisors, with a good and sufficient bond, the record of the board showing the appointment of viewers, the report of the viewers in proper form, and its approval, the assessment of damages, and the setting apart, out of the proper fund, of the money awarded defendant, his refusal for ten days to accept the same, and the order to commence suit for condemnation. (*Los Angeles County v. San Jose etc. Water Co., supra.*)

All these facts were sufficiently proved by the plaintiff.

4. Defendant offered to read in evidence, from the records of the board of supervisors, all entries and minutes made therein relating to the petition in question, for the purpose of showing that the board neither approved the bond offered in evidence by the plaintiff, nor found that the signers of the petition were freeholders within the road district.

It was objected that the absence of an affirmative showing and finding of the facts referred to could not defeat the action, and the mere absence of such findings

was all defendant here offered to show. The court properly sustained the objection, holding that the presumption was in favor of the regularity of the action of the board, and that the burden was on the defendant to show affirmatively the contrary.

5. The defendant offered to prove that there was a shorter and more practicable route than the one sought to be condemned, and, in support of his right to do so, cites *City of Pasadena v. Stimson*, 91 Cal. 259.

But, as we have already said, the question of the necessity for a new road, and of its location, was a matter for determination by the board of supervisors and not by the court. The case cited is not in point. That was a direct proceeding for the condemnation of land, without any intermediate action taken before suit by any board or tribunal acting in a judicial capacity and passing upon the necessity and practicability of the proposed route.

6. The defendant called as a witness one of the supervisors who acted on the petition, and asked him:

"At the time it was presented, or at any time afterward, did the board of supervisors take or hear any evidence as to the age or ages of any of the parties who signed that petition?"

The question was objected to as immaterial and irrelevant, and the court asked:

"What is the object of this testimony, Mr. Farraher?"

"Mr. Farraher. We want to prove that the board of supervisors heard no evidence on this proposition."

The court sustained the objection, and it is earnestly urged that the ruling was erroneous.

There was and is no suggestion or claim that any of the signers were minors, and proof of their age or ages before the board was not required.

7. Some of the supervisors who acted on the petition were called as witnesses to testify as to the damages sustained by defendant. It is objected that their testimony was neither competent nor material; and it is said: "It was a part of their judicial duty in the prem-

ises to determine this damage, and their records were the best evidence of such determination."

The witnesses were certainly competent to testify as to the damages which the defendant would sustain by reason of the laying out of the road; and, while there was some conflict in the evidence upon the question, that introduced by the plaintiff was amply sufficient to justify the finding of the court.

8. While defendant was putting in his evidence he asked leave to amend his answer by adding thereto a denial that he was present at any meeting of the board of supervisors when the matter of opening said proposed highway was acted upon by them, or that he had any notice of the time and place set for the hearing of said matter. On objection of plaintiff the court refused to allow the amendment, and this ruling is assigned as error.

The application was addressed to the sound legal discretion of the trial court, and its action will not be disturbed, unless it appears that it abused its discretion and the defendant was prejudiced thereby. We see no such abuse of discretion as would justify a reversal of the judgment on this ground. The above are all the points requiring special notice, and, in our opinion, the judgment and order should be affirmed.

SEARLS, C., and BRITT, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

HENSHAW, J., MCFARLAND, J., TEMPLE, J.

[No. 18347. Department Two.—November 18, 1895.]

**JAMES CHISHOLM, RESPONDENT, v. WASHINGTON  
KEYFAUVER, APPELLANT.**

**SLANDER—CHARGE OF THEFT—ADMISSIONS OF DEFENDANT—INSTRUCTION INAPPLICABLE TO EVIDENCE.**—In an action of slander for accusing the plaintiff of theft, where there is no evidence that the plaintiff confessed to the theft to the defendant, an instruction to the jury that if they believed from the evidence that the plaintiff stated to the defendant that he had stolen the articles mentioned in plaintiff's complaint, and that defendant without malice made the statements charged in pursuance of such belief, if he did make them, the plaintiff cannot be heard to complain, is improper as being inapplicable to the evidence, and, if given, must be deemed prejudicial to the plaintiff, where the verdict of the jury and the judgment of the court were in favor of the defendant; and a new trial may properly be granted for error in the giving of such instruction.

**APPEAL** from an order of the Superior Court of Sutter County granting a new trial. E. A. DAVIS, Judge.

The facts are stated in the opinion of the court.

*Reece Clark*, and *K. S. Mahon*, for Appellant.

As there was evidence to show that the plaintiff had intentionally by his admissions, conversation, and suspicious acts led defendant to believe that he was a hog thief, defendant was entitled to have an instruction upon it, and the court did not err in giving defendant's eighth instruction. (*Perlberg v. Gorham*, 10 Cal. 120; *Davis v. Russell*, 52 Cal. 611.)

*W. H. Carlin*, and *M. E. Sanborn*, for Respondent.

If, for any cause, the verdict and judgment ought to have been set aside and a new trial granted, the order should be allowed to stand whether the reason assigned for it was right or wrong. (*Hayne on New Trial and Appeal*, sec. 284; *Hastings v. Steamer Uncle Sam*, 10 Cal. 341; *Bolton v. Stewart*, 29 Cal. 615; *Grant v. Moore*, 29 Cal. 644; *Coghill v. Marks*, 29 Cal. 673; *Borkheim v. Fireman's Fund Ins. Co.*, 38 Cal. 506; *Chabot v. Tucker*, 39 Cal. 435; *Altschul v. Doyle*, 48 Cal. 536.)



**THE COURT.**—Action for slander. The complaint is composed of three counts. The first charges, in substance, that the defendant maliciously and falsely spoke and published of and concerning the plaintiff, in the presence and hearing of one R. M. Rockholt, at a specified time and place, that he (defendant) believed that plaintiff stole a certain hog then in plaintiff's possession, thereby meaning and intending to accuse the plaintiff of being guilty of grand larceny; and that said Rockholt so understood the words spoken. The second count is in substance the same as the first, except that the speaking and publication were at a different time and place, and in the presence and hearing of a different person, viz., one J. R. Young. The third count charges that defendant, in the presence and hearing of said J. R. Young, accused plaintiff of having stolen a certain halter strap, intending thereby to charge plaintiff with being guilty of petit larceny, and being so understood by Young, etc.

The answer of the defendant is, perhaps justly, criticised on the ground that it does not specifically nor unqualifiedly deny the speaking or publication of the words alleged to have been spoken; but as there was no demurrer to the answer, and as the cause appears to have been tried, as if the denials were sufficient, it is unnecessary to consider this point.

In addition to denials, the defendant alleged in his answer the following:

“For a further and separate defense, defendant alleges that the plaintiff in said action did, in the month of February, 1893, at Sutter county, admit and state to defendant that he, the plaintiff, had been guilty of stealing hogs; that plaintiff stated to defendant that he, plaintiff, had stolen a pig or young hog, of a fine breed of hogs, from one Mumaw, and that plaintiff pointed out said pig or hog to defendant, and insinuated that he had stolen the same.

“That, at about the time and place last aforesaid, plaintiff stated to the defendant that he, plaintiff, had

lay hidden in the brush near the barn of one Frazier nearly a whole day for the purpose of stealing pigs belonging to said Frazier, and did at said time succeed in stealing about five of said pigs, and did carry said pigs away from said Frazier's in a sack, and bring them to the premises of this defendant, where plaintiff resided, and turn them out, where they now remain.

"That as to the said hog, which plaintiff charges the defendant with having stated that plaintiff did steal said hog, defendant alleges that plaintiff told him conflicting stories as to the manner in which plaintiff had acquired said hog, and did, in the opinion of defendant, act suspiciously when questioned as to how he, plaintiff, had become possessed of said hog, and if defendant ever made any statement in regard to plaintiff and the manner of his acquisition of said hog, that was in any way derogatory to the good name of plaintiff, such statement was brought about by the admission aforesaid in regard to the stealing of the hogs of Mumaw and of Frazier, and the suspicious actions and contradictory statements of plaintiff when questioned about the hog that defendant is charged by plaintiff with having stated that plaintiff had stolen.

"That in relation to said halter strap, defendant alleges that plaintiff made many contradictory statements about how he became possessed of the same, and that such contradictory statements, coupled with the admissions to defendant that plaintiff did steal hogs, caused defendant to believe that plaintiff might have been guilty of stealing said halter strap, and if defendant ever made any statement touching the manner in which plaintiff had acquired said strap, such statement was made in a general way that the plaintiff was dishonest, and was based upon the admissions of plaintiff that he had stolen hogs and had 'swiped' the halter strap, 'swiped' being a word which plaintiff used when questioned by defendant as to his manner of acquiring said strap.

"That at divers times within the year last past plain-

tiff has taken wood from the premises of others, without their knowledge or consent, and without right, and surreptitiously and clandestinely, that is to say, plaintiff has admitted to the defendant that he has done so.

"That the 'Young' mentioned in plaintiff's complaint, in 1892 or 1893 stated to defendant that plaintiff had solicited said Young to engage with him, plaintiff, in 'trapping' hogs in Colusa county, meaning thereby that plaintiff and Young should steal hogs in said county.

"That if defendant ever used any language toward plaintiff that could be construed into the meaning that plaintiff stole hogs or halter straps, defendant made such statement fully and honestly believing that the same was true, and that he made the same without malice and for justifiable ends, and without intending to injure or damage plaintiff, and that such statements were caused by the admissions of plaintiff to the defendant aforesaid, and by the suspicious conduct and equivocal actions of plaintiff when questioned as to his manner of the acquisition of said hogs and halter strap.

"That if defendant ever made the statement imputed to him about plaintiff, or anything that could be construed to imply that plaintiff did steal said strap and hog, that defendant verily believes that such statement was true, as the plaintiff had, as hereinbefore alleged, stated that he, plaintiff, had been guilty of both grand and petit larceny in stealing pigs and in 'swiping' [stealing] the halter strap.

"Wherefore, defendant demands judgment against plaintiff for his costs."

The verdict of the jury and the judgment of the court were in favor of the defendant. The plaintiff moved for a new trial on the grounds of insufficiency of the evidence, that the verdict is against law, and errors in law. The court granted a new trial, but upon what ground the record does not show. The appeal is from the order granting a new trial.

Counsel for appellant says in his brief that the new trial was granted solely on the ground that the court

erred in giving the following instruction, at request of defendant:

"Subdivision 3 of section 1962 of the Code of Civil Procedure of this state, which declares the law, reads: 'Whenever a party has, by his own declarations, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it.' I therefore instruct you that if you believe from the evidence that Chisholm stated to defendant that he, Chisholm, had stolen the hog and halter strap mentioned in plaintiff's complaint, and that Keyfauver, without malice, made the statements charged in pursuance of such belief (if he did make them), Chisholm cannot, in such case, be heard to complain. For it is a well-settled rule of law that no man has a right to take advantage of his own willful and deliberate wrongs."

Counsel for appellant further says in his brief that in granting the motion for a new trial the court said: "That if said instruction is correct law, it provides a new mode of justification, and that a defendant may justify a slanderous charge without proving its truth. . . . Besides, I find no evidence in the statement showing that plaintiff confessed to the defendant that he stole either the hog or the strap. This instruction, therefore, constitutes an error, which must be deemed prejudicial to plaintiff, and it is by reason of this error alone that I shall grant a new trial."

Counsel for respondent does not deny that the court used this language, but contends not only that the giving of this instruction was error, but also contends that the order granting a new trial is justifiable on other grounds, and especially on the grounds that the evidence was insufficient to justify the verdict of the jury, and that the court erred in striking out plaintiff's evidence of his good character.

Without deciding as to the merits of the instruction in question as an abstract proposition of law, I think

the court was right in saying it was not applicable to the evidence, and yet might have been prejudicial to plaintiff.

The order appealed from is affirmed, with leave to the defendant to amend his answer if so advised.

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[No. 18443. Department Two.—November 18, 1895.]

**WILLIAM T. BOYCE, ADMINISTRATOR, ETC., APPELLANT, v. ASA FISK, RESPONDENT.**

**MORTGAGE BY DEED ABSOLUTE—REDEMPTION—EXCESSIVE INTEREST—EQUITABLE RELIEF.**—In order to redeem from a deed absolute in form, which was intended as a mortgage, the mortgagor must pay the rate of interest agreed upon in the note which was given for the indebtedness secured by the deed, although such interest is largely in excess of the current rates prevailing at the date of the note, and equity can grant no relief against such interest because merely of the excessive rate, in the absence of proof of other circumstances tending to show actual fraud, or oppression and overreaching, warranting the inference of undue advantage.

**ID.—CONTRACT FOR INTEREST—EQUITY BOUND BY THE LAW.**—In this state parties may agree in any contract in writing for the payment of any rate of interest, and it must be allowed, according to the terms of the agreement, until the entry of judgment, and courts of equity are as much bound by the laws of the land as courts of law.

**ID.—HARD BARGAIN.**—The fact that a bargain is a very hard or unreasonable one is not sufficient *per se* to induce a court of equity to interfere with the contract.

**ID.—STATUTE OF LIMITATIONS—CONDITION OF REDEMPTION.**—The fact that the debt is barred by the statute of limitations does not absolve the mortgagor who would redeem the mortgaged property from paying the debt as a condition of redemption.

**ID.—ACTION TO QUIET TITLE—FORM OF JUDGMENT ALLOWING REDEMPTION—REMEDY FOR OUTLAWED DEBT—DISMISSAL—BAR OF PLAINTIFF'S RIGHT.**—In an action to quiet the title of the plaintiff to land which had been conveyed to the defendant as a mortgage security to pay a note which had been barred by the statute of limitations, although the plaintiff cannot have his title quieted while the money for which the mortgage was given remains unpaid, and the court may provide by its judgment for the payment of the amount due, yet the defendant cannot have any affirmative remedy for his outlawed debt, and the only proper judgment would be that upon the failure of the plaintiff to pay the amount remaining unpaid upon the mortgage debt within a time specified by the court, the action should be dismissed, and it is erroneous to adjudge that upon the failure of the plaintiff to pay that amount, all his right and title to the mortgaged premises shall cease and

determine, and that the title of the defendant thereto shall be good and valid, and that plaintiff shall be barred from asserting any claim, interest, or title to the premises.

1D.—**WAIVER OF STATUTE OF LIMITATIONS—ESTATES OF DECEASED PERSONS—POWER OF ADMINISTRATOR.**—An administrator will not be permitted to waive the statute of limitations upon a claim which is barred by the statute of limitations, and he does not waive such claim, nor the presentation of it against the estate, by bringing an action to quiet the title of the estate as against one to whom the decedent had conveyed his land to secure a debt which is barred by the statute of limitations.

**APPEAL** from a judgment of the Superior Court of Fresno County. J. R. WEBB, Judge.

The facts are stated in the opinion of the court.

*Bert Schlesinger, John L. Boone, and George L. Hood,*  
for Appellant.

The terms imposed on the appellant by the lower court were unreasonable. It should have only made him do equity by paying the original debt with legal interest from the date of the loan until paid. (1 *Pomeroy's Equity Jurisprudence*, 385, 386; *Hanson v. Keating*, 4 Hare, 1; *Booth v. Hoskins*, 75 Cal. 276; *Spect v. Spect*, 88 Cal. 443; 22 Am. St. Rep. 314; *Fogg v. St. Louis etc R. R. Co.*, 17 Fed. Rep. 871; *Brown v. Hall*, 14 R. I. 249; 51 Am. Rep. 375; *Sime v. Norris*, 8 Phila. 84; *Story's Equity Jurisprudence*, 188; *Kelley v. Caplice*, 23 Kan. 474; 33 Am. Rep. 179; 1 *Parsons on Contracts*, 437; *Floyer v. Edwards*, Cowp. 112; *Young v. Hill*, 23 Am. Rep. 110; *Davis v. Garr*, 55 Am. Dec. 397; *Breckenridge v. Brooks*, 2 A. K. Marsh. 335; 12 Am. Dec. 401.) The court erred in deciding that defendant should be entitled to the ownership of the premises unless appellant redeem within a certain time. (*Booth v. Hoskins, supra.*)

*Daniel Titus*, for Respondent.

Parties may agree in writing for the payment of any rate of interest, and it shall be allowed according to the terms of the agreement, until the entry of judgment.

(Civ. Code, sec. 1918; *Hinds v. Marmolejo*, 60 Cal. 229; *Farmers' Nat. Gold Bank v. Stover*, 60 Cal. 387.) A mortgagor cannot recover the possession of the mortgaged premises from the mortgagee without paying the mortgage debt, even though the statute has run against the debt, thereby taking from the mortgagee his remedy for its enforcement. The mortgagor is not entitled to any relief without first paying the mortgage debt. (*Booth v. Hoskins*, 75 Cal. 271; *Zellerbach v. Allenberg*, 99 Cal. 69; *Grant v. Burr*, 54 Cal. 298; *Spect v. Spect*, 88 Cal. 437; 22 Am. St. Rep. 314; *Phyfe v. Riley*, 15 Wend. 248; 30 Am. Dec. 55; *Hubbell v. Moulson*, 53 N. Y. 225; 13 Am. Rep. 519; *Fee v. Swingly*, 6 Mont. 596; *Roberts v. Sutherlin*, 4 Or. 220; *Cooke v. Cooper*, 18 Or. 142; 17 Am. St. Rep. 709; *Frink v. Le Roy*, 49 Cal. 314; *Tallman v. Ely*, 6 Wis. 244; *Brinkman v. Jones*, 44 Wis. 512; *Sahler v. Singer*, 44 Barb. 614; Jones on Mortgages, sec. 715.)

THE COURT.—This action was brought to obtain a decree to the effect that Thomas Boyce was, at the time of his death, the owner in fee simple of an undivided half of section 15 in township 14 south, range 14 east, Mt. Diablo base and meridian, situate in the county of Fresno, state of California; that an accounting be had to determine the amount due to defendant upon a mortgage; and that defendant has no right, title, or interest in the land, except as a mortgagee thereof, and that upon the payment to defendant of such sum as may be found due him (if any) he be required to satisfy his mortgage.

The cause comes up on the appeal of plaintiff from the final decree, and is presented upon the judgment-roll, unsupported by any statement or bill of exceptions.

The findings show that on the seventh day of August, 1880, Thomas Boyce was the owner of the tract of land hereinbefore mentioned, and that on said last-mentioned day he borrowed from Asa Fisk, the defendant and respondent herein, the sum of \$260, and made to the latter his promissory note in writing in the words and figures following:

"SAN FRANCISCO, CAL., Aug. 7, 1880.

"\$260.00.

"Thirty days after date (without grace) I promise to pay to Asa Fisk, or order, the sum of two hundred and sixty dollars, to be paid only in gold coin of the government of the United States of America, for value received, with interest thereon in like gold coin from maturity at the rate of four (4) per cent per month until paid. Interest to be paid monthly in advance, and if not so paid to become a part of the principal, and bear thereafter the same rate of interest, compounded monthly in advance, for value received. This note to be paid at the office of Asa Fisk.

[Signed] "THOMAS BOYCE."

To secure the payment of the said promissory note, Boyce executed and delivered to Fisk a deed of conveyance, absolute in form, but intended as a mortgage of the tract of land hereinbefore mentioned, and at the same time, and as further security, assigned to said Fisk a policy of insurance, fully paid up, upon the life of him, the said Boyce, issued by the Connecticut Mutual Life Insurance Company of Hartford, Connecticut.

No part of the promissory note, principal, or interest was ever paid by Boyce or by any one up to the date of his death, which occurred on the eleventh day of October, 1892. On the 28th of March, 1893, Fisk collected \$1,150 on the said policy of insurance, and applied the same on account and in part payment of the interest then due on the said promissory note. Fisk paid all the taxes levied upon the land, amounting to \$108.31, and never claimed to hold or own the land except as a mortgagee. Plaintiff was duly appointed administrator of the estate of said Thomas Boyce, deceased, April 17, 1893, and duly qualified, and is still acting as such administrator.

The court further found that "by the agreed statement of facts herein, that it has been stipulated that the court may grant to either party such proper, legal, or equitable relief as either party may be entitled to under



said stipulation and the pleadings and facts in the case, and in accordance therewith, and as equitable adjustment and decision."

The court then proceeded to allow to defendant, Fisk, interest upon the promissory note according to its terms for four years from its date, and seven per cent per annum upon the amount thus found due at the expiration of said term of four years; deducted the sum collected on the insurance policy in 1893, leaving a balance due at the date of the decree of \$1,606.06, and decreed that upon the payment of said sum of \$1,606.06, with legal interest thereon from the date thereof, within one year from said date, viz., May 14, 1894, the defendant should satisfy the mortgage. Also that should plaintiff fail within one year from said date to pay said sum of money, then and in that event his right to the land should cease and be barred, and defendant's title thereto should be good and valid, and that each party should pay his own costs. A decree was entered accordingly.

The contention of appellant is that the terms imposed by the superior court upon plaintiff, as a condition of the redemption of the property, are unreasonable and exorbitant; that the terms of the promissory note to defendant were so manifestly unjust and oppressive that a court of equity should refuse to uphold them, and that plaintiff should only be called upon to return the money borrowed, with legal interest thereon.

We can only look to the amended complaint, answer, findings, and decree in determining the questions presented. The real question under these circumstances is, Do the findings respond to the issues, and do they support the decree?

Finding 8 is to the effect that the parties have stipulated "that the court may grant to either party such proper, legal, or equitable relief as either party may be entitled to under said stipulation and the pleadings and facts in the case, and in accordance therewith, and as an equitable adjustment and decision."

Turning to the complaint we find therein no charge

or suggestion of mistake or accident in making the note, or that defendant Fisk was guilty of any misrepresentation, fraud, or oppression in procuring decedent, Thomas Boyce, to make the note, or execute and deliver the securities. If the plaintiff, as representative of Thomas Boyce, deceased, is entitled to any relief in a court of equity, if he is entitled to redeem the mortgaged property without a compliance with the terms and conditions of the agreement made by his decedent, it must be upon the ground that the terms and conditions of the promissory note were so onerous as to authorize the court to refuse to enforce its provisions.

In this state "parties may agree in any contract in writing for the payment of any rate of interest, and it shall be allowed, according to the terms of the agreement, until the entry of judgment." (Civ. Code, sec. 1918.)

Courts of equity are as much bound by the laws of the land as courts of law, and neither may set aside or annul contracts, made in strict compliance therewith, with impunity. The rate of interest provided for in the note to Fisk was, no doubt, largely in excess of the current rates prevailing at the date of the note in question. At an early period in the history of this state the rate of interest agreed upon in this note would have been much below current rates. When given it was much greater than such rates.

No doubt the excess of interest is a circumstance which, coupled with others tending to show actual fraud, or such circumstances of oppression and overreaching as warrant the inference of undue advantage, is sufficient cause for setting aside a contract. But without some such showing a court of equity may not disregard the contract which the parties have deliberately made, and make a new one for them. If the court, under such circumstances, can decree the rate of interest stipulated in a given written contract as being too large and establish a lower rate, then, by parity of reasoning, it should be at liberty in a similar case, but where the rate of in-

terest agreed upon is deemed too small, to fix a larger one, and thus it would, in effect, become the guardian of business men, and be at liberty to supervise and modify all their contracts.

Had Fisk brought an action to foreclose his mortgage within the lifetime of his demand, can there be any doubt but that, in the absence of any showing of fraud or mistake, he would have been entitled to a decree? We think not.

The fact that his debt is barred by the statute of limitations does not absolve his mortgagor, who would redeem the mortgaged property, from paying the debt. The moral obligation remains and rests upon the mortgagor who would redeem to pay, as a condition thereof, the sum of money which the mortgagee could have recovered but for the bar of the statute. (*Spect v. Spect*, 88 Cal. 437; 22 Am. St. Rep. 314; *Booth v. Hoskins*, 75 Cal. 271; *Grant v. Burr*, 54 Cal. 298; *Zellerbach v. Allenberg*, 99 Cal. 69.)

We have examined with care the several cases cited by the appellant in support of his contention. *Brown v. Hall*, 14 R. I. 249, 51 Am. Rep. 375, which may be regarded as a leading case, was a bill to redeem from a mortgage in which the complainant sought to have the interest (five per cent per month) reduced to a legal or reasonable rate on the ground that the stipulated rate was grossly exorbitant.

The complaint stated particularly the circumstances under which the note and mortgage were originally given for the purpose of showing that he did not fully understand the terms of the note when he signed it, and that the defendant took advantage of his necessities and inexperience and of his confidence, to overreach and impose upon him. The court allowed the conventional interest, for six months, under a statute of Rhode Island, which permitted borrowers and lenders to make their own terms in regard to interest, and reduced the interest to a reasonable rate, after the maturity of the note.

It is not plain, from the report, what the evidence showed, but it may fairly be inferred that it went beyond the allegations of the complaint, for the court said: "We hesitate at this decision only because the facts on which we rest it are very imperfectly alleged in the bill. The facts, however, were put in evidence without objection, and this being a bill to redeem, we do not think we ought to oblige the complainant to submit to unjust terms of redemption by reason of any technical defect, but should rather permit him to amend, if amendment be necessary, on proper terms."

It is very apparent that in that case the elements of fraud and oppression on the part of the mortgagee concurred, with the rate of interest charged, to convince the court that such fraud had been practiced as to warrant a reduction of the conventional rate of interest agreed upon.

*Hough v. Hunt*, 2 Ohio, 495, was a case in which Hough, being oppressed for money, applied to Hunt for a loan of \$2,600. Hunt agreed to lend him \$10,000 on condition that he, the said Hough, should purchase from him 593 acres of land at \$20 per acre, being more than double its value. A portion of the money was loaned.

In an action by Hough for relief the court rescinded the contract for the land, being of opinion that Hunt had taken an unfair advantage of Hough's necessities. The court said: "When a person is encumbered with debts, and that fact is known to a person with whom he contracts, who avails himself of it to exact an unconscionable bargain, equity will relieve on account of the advantage and hardship. Where the inadequacy of the price is so great that the mind revolts at it, the court will lay hold of the slightest circumstances of oppression or advantage to rescind the contract."

In *Butler v. Duncan*, 47 Mich. 94, a young man of dissolute and prodigal habits, in want of money, had given his note for \$5,000, secured by mortgage with interest at ten per cent per annum, on all his property, and had received only about \$2,000, and 160 acres of

land for \$3,200, which was worth little over \$1,000. In rescinding the contract the court said: "To state the transaction mildly, it was taking advantage of Duncan's weakness and anxiety, and, under the guise of an apparently fair business transaction, exacting a usurious interest, which a court of equity cannot sanction."

In this last case, as in the Ohio case, *supra*, it is apparent that an attempt was made to evade the usury law of those states, which in itself, if fully proven, was sufficient to invalidate the contracts, and which, coupled with circumstances of fraud on the part of the parties loaning their funds, served to justify the rulings. In the present case the loan was made, not in evasion of, but pursuant to the letter and spirit of the law, and no circumstances of fraud are charged.

The case of *Sime v. Norris*, 8 Phila. 84, seems to fully sustain the contention of appellant, yet we do not think it can be upheld as the law of this state. The case was this: In 1864, the defendant, Morris, at San Francisco, California, had made his promissory note to Robbins for \$4,125, payable thirty days after date, with interest at two and one-half per cent per month, payable monthly in advance, and if not so paid to be compounded, and become a part of the principal, and bear like interest. The action was by an indorsee against the maker. The claim when sued amounted to over \$26,000, and Sharswood, J., said: "I think this contract, though lawful, was an oppressive and unconscionable one, which the courts of this state [Pennsylvania] ought to have no hand in enforcing according to its letter," and ordered judgment for the principal, and the legal rate of interest then prevailing in California, viz., ten per cent per annum.

The strongest showing in behalf of appellant which we have found is contained in Story's Equity Jurisprudence, at section 331, where he says: "And here we may apply the remark that the proper jurisdiction of courts of equity is to take every one's act according to conscience, and not to suffer undue advantage to be

taken of the strict form of law or of positive rules. Hence it is that even if there be no proof of fraud or imposition, yet if, upon the whole circumstances, the contract appears to be grossly against conscience or grossly unreasonable and oppressive, courts of equity will sometimes interfere and grant relief, although they are certainly very cautious of interfering, unless upon very strong circumstances. But the mere fact that the bargain is a very hard or unreasonable one is not generally sufficient *per se* to induce these courts to interfere. And indeed it will be found that there are very few cases not infected with positive or actual fraud in which they do interfere, except where the parties stand in some very peculiar predicament, and in some sort under the protection of the law from age, or character, or relationship."

The cases cited by the learned author tend to show that, except in case of fraud or imposition, and except where the parties stand in some peculiar predicament by reason of age or condition, such as expectant heirs, sailors, and the like, courts of equity only interfere in the most extraordinary cases.

The fact that a bargain is a very hard or unreasonable one is not in itself sufficient, and that is all that can be said of the contract in the present one. But that part of the judgment which decrees that upon the failure of plaintiff to pay the amount remaining unpaid on the mortgage, all his right and title to the mortgaged premises shall cease and determine, and the title of the defendant thereto shall be good and valid, and plaintiff shall be barred from asserting any claim, interest, or title unto said premises, is unwarranted and erroneous. The proper judgment would be that upon the failure of plaintiff to pay the said amount within the time specified by the court, the action be dismissed. (*Cowing v. Rogers*, 34 Cal. 655; *Booth v. Hoskins*, *supra*.) Although plaintiff cannot have his title quieted under the facts here presented, while the money for which the mortgage was given remains unpaid, still the defendant can have

no affirmative remedy for his outlawed debt—which the judgment as it stands would give him. If plaintiff were suing in his own right, it might, perhaps, be plausibly argued that by his complaint he waived the defense of the statute of limitations against the barred debt of defendant; but an administrator will not be permitted to waive either the general statute of limitations or the failure of a party to present his claim. The judgment must, therefore, be modified as above indicated.

The cause is remanded, with directions to the superior court to modify the judgment as above indicated, by striking therefrom all of the clause immediately preceding the last clause therein, commencing with the words, in folio 72 of the printed transcript: "It is further ordered," and ending with the words, in folio 73, "said premises or any part thereof"; and by inserting instead thereof a provision that if the plaintiff shall not pay the amount found to be unpaid upon the mortgage within a specified time after the entry of the modification of the judgment—the time to be fixed by the superior court—then this action shall be dismissed. In all other respects the judgment appealed from is affirmed. Neither party is to recover costs of this appeal.

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[Crim. No. 32. Department One.—November 19, 1895.]

**THE PEOPLE, RESPONDENT, v. WONG CHONG SUEY,  
APPELLANT.**

**CRIMINAL LAW—GRAND LARCENY—CIRCUMSTANTIAL EVIDENCE—CONFLICT—PROVINCE OF JURY.**—Where there was sufficient circumstantial evidence adduced by the prosecution to authorize the jury to believe in the guilt of a defendant accused of grand larceny, the fact that the evidence on behalf of the defendant tended to account for the money found in his possession, and to rebut the suspicious circumstances, only raised a conflict in the evidence which it was the province of the jury to determine.

**ID.—IDENTIFICATION OF MONEY—SUFFICIENCY OF PROOF.**—The prosecution is not required definitely to identify the money found upon the person of the defendant as being that taken from the safe of the prosecuting witness; but if it is shown to be the same in amount and in the same coin and denomination, and that defend-

ant was in a situation where he could have taken it, and there are other circumstances of a suspicious nature, the evidence is sufficient to go to the jury upon the question of identity of the money, and the sufficiency of the evidence to establish that fact is for the jury.

**Id.—PROVINCE OF JURY—CONCLUSIVENESS OF VERDICT.**—When there is any evidence legally tending to sustain a fact, the question whether it amounts to proof of that fact is for the jury, and their finding will not be disturbed upon appeal, unless the evidence preponderates so greatly against the verdict as to make it manifest that the verdict is the result of passion or prejudice.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. **GEORGE H. BAHRs**, Judge.

The facts are stated in the opinion of the court.

*J. J. Scrivner*, for Appellant.

Where a criminal charge is to be proved by circumstantial evidence, the proof ought to be not only consistent with the prisoner's guilt, but inconsistent with any other reasonable hypothesis consistent with the proof. (*People v. Shuler*, 28 Cal. 490; *People v. Strong*, 30 Cal. 151; *People v. Dick*, 32 Cal. 213; *People v. Murray*, 41 Cal. 66; *People v. Wong Ah You*, 67 Cal. 31.)

*W. F. Fitzgerald*, Attorney General, and *Charles H. Jackson*, Deputy Attorney General, for Respondent.

It is the peculiar province of the jury to weigh the evidence and decide upon the credibility of witnesses; and this court will not disturb verdicts on this ground unless there is either a total deficiency in the evidence, or it preponderates so greatly against the verdict as to render it clear that the jury must have been under the influence of passion or prejudice. (*Hayne on New Trial and Appeal*, 856; *People v. Dick*, 32 Cal. 214; *People v. Ybarra*, 17 Cal. 171; *People v. Ah Fung*, 17 Cal. 377; *People v. Dick*, 34 Cal. 663; *People v. Estrada*, 53 Cal. 600; *People v. Manning*, 48 Cal. 335; *People v. Ah Loy*, 10 Cal. 301; *People v. Freeman*, 92 Cal. 359; *People v. Ah Jake*, 91 Cal. 98-101; 1 Chitty's Criminal Law,



528; *Wilson v. Fitch*, 41 Cal. 385.) The severest test of circumstantial evidence is that nobody could possibly have committed this robbery but the defendant, and no reasonable hypothesis could be formed by which defendant could be regarded as innocent. (*People v. Murray*, 41 Cal. 66.)

VAN FLEET, J.—Defendant appeals from a judgment convicting him of grand larceny and an order denying him a new trial, and makes the single point that the evidence is insufficient to sustain the verdict.

We were strongly of the impression at the oral argument that the contention of appellant could not be sustained, but the point was urged with so much earnestness and evident sincerity on the part of counsel in the correctness of his position, as to induce at our hands a further careful examination and consideration of the evidence in the light of the criticisms passed upon it. The result is only to confirm our impressions into conviction, and to satisfy us that we would not be warranted in disturbing the verdict.

The specific charge was the taking of sixty dollars in money belonging to one Hervey on October 26, 1894, and the evidence of the prosecution tended to show these facts in substance. Defendant was a domestic in the family of Hervey, having been recently employed therein as cook. His sleeping room was in the basement. In another room in the basement his employer had a safe in which he kept valuable papers, and, at times, a limited sum of money for current household expenses. On this occasion it contained sixty dollars in gold in twenty-dollar pieces. The defendant had opportunity to know the general purposes for which the safe was kept, and had access to the room wherein it stood. On the date in question, between 7 and 8 o'clock in the evening, just after finishing his work for the day, the defendant came upstairs and announced in an apparently excited manner that he had lost all his money, every cent he had, and some clothing; that his room

had been entered and thirty-four dollars in money, a pair of new trousers that he had just got the day before, and an overcoat taken. Upon immediate investigation by Mr. Hervey, it was discovered that the safe door stood open, and that the sixty dollars and some small articles of jewelry had been abstracted from the money drawer, but that nothing else in the safe had been in any way disturbed, nor was any further evidence discovered in the basement of the presence of an intruder. The defendant's room was in order and undisturbed, except that defendant claimed that his clothing had been taken from the wall, with the money which he claimed had been left in the pocket of one of the garments. A small window stood open near the safe, but the blinds were closed and a heavy layer of dust on the sill was wholly undisturbed, and there was nothing to indicate that any one had passed in or out by that means. The door leading out of the basement was locked and defendant had the key.

The police were at once called, and on their arrival they accused defendant of the theft and searched his person. In one of his pockets was found his purse containing a small sum of money, but in a small fob pocket of his trousers was discovered three twenty-dollar gold pieces. It appeared that Mr. Hervey had had occasion to go to the safe for some money that afternoon about 2 o'clock, and was of the impression that he had neglected to turn on the combination when leaving it. The defendant was at the time in the basement and saw his employer go to the safe. It was also shown that when Mr. Hervey went to call the police he told the defendant to wait until they came, but that he started down town and reluctantly came back on being requested; at this time he had on an overcoat, but whether the one he claimed to have lost does not appear. It was further shown that the statement of defendant about buying a new pair of trousers the day before was untrue.

The theory of the prosecution was that defendant found the door of the safe unlocked, took the money,

and then to divert suspicion from himself made up the story of having been himself robbed; and it is perfectly obvious that if the jury believed the evidence of the prosecution it was sufficient to sustain this theory. It is true the evidence is wholly circumstantial and that the evidence on behalf of defendant tended to account for the money and rebut the suspicious circumstances, but the only effect of this was to raise a conflict which it was the province of the jury to determine.

It was not required that the prosecution should definitely identify the money found on the person of the defendant as that taken from the safe. It was shown to be the same in amount and in the same coin and denomination, and that defendant was in a situation where he could have taken it, and, in connection with the statements of defendant that he had just been robbed of all his money, and the other circumstances of a more or less suspicious nature appearing, was sufficient evidence to go to the jury upon the point. Its sufficiency to establish the fact was for the jury. When there is any evidence legally tending to sustain a fact the question whether it amounts to proof of that fact is to be left to the jury, and their finding will not be disturbed by this court unless the evidence preponderates so greatly against the verdict as to make it manifest that the verdict is the result of passion or prejudice. (*People v. Freeman*, 92 Cal. 359; *People v. Ah Jake*, 91 Cal. 98; *People v. Estrada*, 53 Cal. 600.) This case does not disclose such a state of facts, and, however much merit there may be in fact in appellant's claim of innocence, the verdict of the jury is, under the circumstances, conclusive upon us.

The judgment and order are affirmed.

HARRISON, J., and GAROUTTE, J., concurred.

Hearing in Bank denied.

[No. 18362. Department Two.—November 19, 1895.]

**MARY ELLA SMITH ET AL., RESPONDENTS, v. PATRICK HAWKINS, APPELLANT.**

**WATER RIGHTS—APPROPRIATION—EXCESS OF WATER—FINDING AGAINST EVIDENCE.**—Where the plaintiff claims the waters of a creek by virtue of a prior appropriation, and the defendant by a subsequent diversion and prescriptive right, a finding that, during the time the defendant has diverted the water, an excess has flowed in the creek above the capacity of both ditches, is not sufficiently supported by the mere observation of the trial judge who visited the premises once near the close of the rainy season, just prior to the judgment, where the other uncontradicted evidence adduced upon the trial shows that all of the water of the creek was taken in one of the ditches during one season.

**ID.—RIGHTS OF APPROPRIATOR OF WATER—LICENSE—EASEMENT—CONGRESSIONAL GRANT.**—An appropriator of water which is conveyed across the public domain is a licensee of the general government; but when such part of the public domain passes into private ownership, it is burdened by the easement granted by the United States to the appropriator, who holds his rights against the land under an express grant of Congress by the act of 1866.

**ID.—ACQUISITION OF PRESCRIPTIVE RIGHT.**—A prescriptive right cannot be acquired against the United States, and can be acquired only by one claimant against another private individual; and one who claims a right by prescription must use the water continuously, uninterruptedly, and adversely for a period of at least five years, after which time the law will conclusively presume an antecedent grant to him of his asserted right.

**ID.—CONSTRUCTION OF CODE—EXTINGUISHMENT OF SERVITUDE ACQUIRED BY ENJOYMENT—PRESCRIPTIVE RIGHT.**—Section 811 of the Civil Code, which provides that when a servitude is acquired by enjoyment, disuse thereof by the owner of the servitude for the period prescribed for acquiring title by enjoyment extinguishes the servitude, deals only with the extinguishment of servitudes resting upon prescriptive right, and not of one conferred by express grant from the United States to a prior appropriator.

**ID.—DISUSE OF WATER APPROPRIATED—FORFEITURE OF RIGHT—PERIOD OF DISUSE—CONSTRUCTION OF CODE.**—Section 1411 of the Civil Code, which declares that the appropriation of water must be for some useful or beneficial purpose, and that, when the appropriator, or his successor in interest, ceases to use it for such purpose, the right ceases, deals with the forfeiture of the right by nonuser alone as distinguished from abandonment; and, by analogy, this section must be construed as making a cessation of the use by the appropriator work a forfeiture of his right, where there is a failure to make any beneficial use of the water for a period of more than five years, and, in such case, a subsequent appropriator for a beneficial use acquires a right to the water.

**APPEAL** from a judgment of the Superior Court of Nevada County. JOHN CALDWELL, Judge.

The facts are stated in the opinion of the court.

*C. W. Kitts*, for Appellant.

Five years' disuse of a water right constitutes abandonment. (Civ. Code, sec. 811; *Davis v. Gale*, 32 Cal. 27; 91 Am. Dec. 554; *American Co. v. Bradford*, 27 Cal. 361; *Union Water Co. v. Crary*, 25 Cal. 504; 85 Am. Dec. 145.)

*P. F. Simonds*, for Respondents.

An abandonment takes place only when one in possession of land leaves with the intention of not again resuming possession, and it must be made to appear affirmatively by the party relying upon it. (*Moon v. Rollins*, 36 Cal. 333; 95 Am. Dec. 181.) There can be no adverse possession of a water right, and title by prescription cannot be acquired, unless the acts constituting the adverse use are of such a nature as to give a cause of action in favor of the person against whom those acts are performed, and to raise the presumption of a grant of an easement as the only hypothesis on which to account for his failure to complain thereof. (*Lakeside Ditch Co. v. Crane*, 80 Cal. 181; *Alta Land Co. v. Hancock*, 85 Cal. 226; 20 Am. St. Rep. 217.)

THE COURT.—Action begun in October, 1892, to quiet the alleged title of plaintiffs to a dam, ditch, and water right for the diversion of the waters of Wolf creek in Nevada county. As early as the year 1862 one John Ross was in possession of the ditch and sold water from the same. The ditch claimed by plaintiffs is two-thirds of a mile in length; its original capacity was four hundred and fifty-seven inches of water, though it seems to be now so filled up as to be capable of carrying about one hundred inches only. Plaintiffs claim in virtue of a deed to them executed by Ross in March, 1888, which, for the purposes of the decision, we shall assume was sufficient to convey his title to the property in dispute. Since the year 1875 taxes have been annually assessed against such property and paid by Ross and his suc-

cessors, the plaintiffs. In 1890 it was leased by plaintiffs to persons who made no use of it, but who paid two months' rental therefor at fifteen dollars per month.

Defendant owns a piece of land lying below the head of the Ross ditch and riparian to said creek; one-fourth of a mile of the length of such ditch is on defendant's said land, and was there constructed before defendant settled on the same; he having acquired title to the land under the federal homestead laws, the patent therefor was issued to him in 1891. In 1879 the defendant constructed a ditch tapping the creek about fifty feet below the Ross dam and having a capacity of two hundred inches of water under six-inch pressure; and, by that means, for thirteen years next before the commencement of this action, continuously, uninterruptedly, with a claim of right, peaceably, and with the knowledge of plaintiffs and said Ross, defendant diverted such water to the extent of the capacity of his ditch, and used the same for agricultural purposes on his said land. For the period of five years and more next before the commencement of the action, the dam, ditch, and water right claimed by plaintiffs have not been used by Ross, or any one who has succeeded to his interest, for any useful or beneficial purpose; neither he nor they have ever owned any property below the head of that ditch to which the water could be applied; for any purpose of profit its use was contingent on its sale or rental to other persons; and this occurred very infrequently. The court found that plaintiffs are the owners of the property claimed by them; that enough water flows in the creek to fill both ditches to their full capacity; that the use of the water by defendant has not been adverse; that his rights to the water are subordinate to those of plaintiffs; and gave judgment in plaintiffs' favor. We think these conclusions are contrary to the evidence in several particulars.

1. The finding that during the time defendant has diverted the water an excess has flowed in the creek above the capacity of both ditches finds support in an

observation only of the judge of the court below who visited the premises just prior to the judgment in the action—rendered April 3, 1893—and then saw water flowing in the creek as stated in the finding. This single observation, made near the close of the rainy season, is wholly insufficient to sustain the finding in view of other uncontradicted evidence that during one season all of the water of the creek was taken in one of the ditches.

2. Plaintiff's predecessor in interest appropriated water by means of his ditch, and conveyed it over and across the land of the defendant, which, at the time of appropriation, was a part of the public domain. While the rights of rival claimants and appropriators, as between themselves, had for a long time been recognized and adjusted, both by mining custom and adjudications in the state courts, it was not until 1866 that they met with federal cognizance and sanction. In that year the United States conferred upon those who had or who might thereafter appropriate water, and conduct the same over the public land, a license so to do; and further provided that all patents granted, or pre-emp-tions or homesteads allowed, should be subject to any such vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as might have been acquired under or recognized by the act. (U. S. Rev. Stats., secs. 2339, 2340.)

An appropriator of water under these circumstances, and while the land which he subjects to his necessary uses continues to be part of the public domain, is a licensee of the general government; but when such part of the public domain passes into private ownership it is burdened by the easement granted by the United States to the appropriator, who holds his rights against this land under an express grant. In this essential respect, that is to say, in the origin of the title under which the servient tenement is subjected to the use, one holding water rights by such appropriation differs from one who holds water rights by prescription.

The differences are twofold. A prescriptive right could not be acquired against the United States, and can be acquired only by one claimant against another private individual. Again, such an appropriation, to perfect the rights of the appropriator, does not necessitate use for any given length of time, while time and adverse use are essential elements to the perfection of a prescriptive right. One who claims a right by prescription must use the water continuously, uninterruptedly, and adversely for a period of at least five years, after which time the law will conclusively presume an antecedent grant to him of his asserted right.

Section 811 of the Civil Code, subdivision 4, discussing the extinguishment of servitudes, declares: When the servitude is acquired by enjoyment, disuse thereof by the owner of the servitude for the period prescribed for acquiring title by enjoyment extinguishes the servitude. That this section cannot in strictness be applied to rights under such an appropriation as we have been discussing becomes obvious when, as above pointed out, it is considered that there is no period prescribed for acquiring title to such rights. Section 811, therefore, deals with the extinguishment of servitudes resting upon prescriptive right, a right vesting by reason of continued adverse enjoyment.

Section 1411 of the Civil Code declares that the appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose, the right ceases. This section deals with the forfeiture of a right by nonuser alone. We say nonuser, as distinguished from abandonment. If an appropriator has, in fact, abandoned his right, it would matter not for how long a time he had ceased to use the water, for the moment that the abandonment itself was complete his rights would cease and determine. Upon the other hand, he may have leased his property, and paid taxes thereon, thus negating the idea of abandonment, as in this case, and yet may have failed for many years to make



any beneficial use of the water he has appropriated. The question presented, therefore, is not one of abandonment, but one of nonuser merely, and, as such, involves a construction of section 1411 of the Civil Code. That section, as has been said, makes a cessation of use by the appropriator work a forfeiture of his right, and the question for determination is, How long must this nonuser continue before the right lapses?

Upon this point the legislature has made no specific declaration, but, by analogy, we hold that a continuous nonuser for five years will forfeit the right. The right to use the water ceasing at that time, the rights of way for ditches and the like, which are incidental to the primary right of use, would fall also, and the servient tenement would be thus relieved from the servitude.

In this state five years is the period fixed by law for the ripening of an adverse possession into a prescriptive title. Five years is also the period declared by law after which a prescriptive right depending upon enjoyment is lost for nonuser; and for analogous reasons we consider it to be a just and proper measure of time for the forfeiture of an appropriator's rights for a failure to use the water for a beneficial purpose.

Considering the necessity of water in the industrial affairs of this state, it would be a most mischievous perpetuity which would allow one who has made an appropriation of a stream to retain indefinitely, as against other appropriators, a right to the water therein, while failing to apply the same to some useful or beneficial purpose. Though during the suspension of his use other persons might temporarily utilize the water unapplied by him, yet no one could afford to make disposition for the employment of the same, involving labor or expense of any considerable moment, when liable to be deprived of the element at the pleasure of the appropriator, and after the lapse of any period of time, however great.

The failure of plaintiffs to make any beneficial use of the water for a period of more than five years next pre-

ceding the commencement of the action, as found by the court, results from what has been said in a forfeiture of their rights as appropriators.

The judgment and order are reversed.

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[S. F. No. 272. In Bank.—November 19, 1895.]

**J. J. TRUMAN ET AL., v. BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO.**

**MUNICIPAL CORPORATIONS—TAXATION—POWER OF SUPERVISORS—VETO OF MAYOR.**—Under the present statutory law, the board of supervisors of the city and county of San Francisco have the power to fix the rate of taxation, and the mayor has no veto of their action in that matter.

PETITION in the Supreme Court for a writ of mandate to the board of supervisors of the City and County of San Francisco.

The petition was filed to enforce a veto by the mayor of a rate of taxation fixed by the board of supervisors, and to compel them to act a second time in fixing the rate of taxation in subordination to the veto of the mayor.

*McKinstry & McKinstry, and Charles Wesley Reed,* for Petitioners.

The mayor or president of the board of supervisors of San Francisco is still vested with the power to veto every order of the board levying or laying a tax for city purposes, as he had that power before the passage of the act of March 28, 1895, and that act does not, by its terms, deprive him of the veto power. If it attempts to do so it is unconstitutional, being special in its nature. (*People v. McCreery*, 34 Cal. 432; *Savings & Loan Society v. Austin*, 46 Cal. 416; *People v. Reis*, 76 Cal. 269, 276; *Desmond v. Dunn*, 55 Cal. 251; *Darcy v. San Jose*, 104 Cal. 642; *Bruch v. Colombet*, 104 Cal. 351; *Thomason v. Ashworth*, 73 Cal. 79.)

*Harry T. Creswell, City and County Attorney, for Defendants.*

The Political Code furnishes a uniform and complete revenue system, which applies to the city and county of San Francisco, and nowhere gives a mayor of a city and county the right officially to approve or disapprove a tax levy, and no such right exists. (Pol. Code, tit. 9, pt. 3; *Savings & Loan Society v. Austin*, 46 Cal. 482; *People v. Clunie*, 70 Cal. 506; *People v. Reis*, 76 Cal. 276; *Thomason v. Ashworth*, 73 Cal. 73.)

THE COURT.—Petition for writ of mandate. Assuming, but not deciding, that this court could control legislative action of the board of supervisors, as prayed for in this proceeding, the writ must be denied, because under present statutory law the board of supervisors of the city and county of San Francisco have the power to fix the rate of taxation, and the mayor has no veto of their action in that matter. If other duties of the court permit, reasons for this conclusion will be more fully given in an opinion to be hereafter prepared.

The writ is denied and the proceeding dismissed.

McFARLAND, J., GAROUTTE, J.,  
HARRISON, J., VAN FLEET, J.,  
HENSHAW, J., BEATTY, C. J.

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[S. F. No. 121. In Bank.—November 22, 1895.]

JACOB A. FISCHER ET AL., PETITIONERS, v. SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO ET AL., RESPONDENTS.

CORPORATIONS — RECEIVER — NOTICE — BOND — JURISDICTION — CONTEMPT—PROHIBITION.—An order appointing a receiver of the property of a corporation, made without any notice, and without any bond from the plaintiff on the appointment of the receiver, is without jurisdiction, and the enforcement of the order by proceedings for contempt, for refusing to deliver property to the receiver, will be prevented by writ of prohibition.

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- ID.—NECESSITY OF NOTICE UPON APPOINTMENT OF RECEIVER.**—A receiver will not be appointed to take property out of the possession of a defendant without trial, without previous notice to the defendant, save in case of irreparable pending injury, and in no case where a temporary injunction would be sufficient.
- ID.—PROPERTY IN POSSESSION OF ANOTHER RECEIVER—JURISDICTION.**—A court has no power to appoint a receiver where a receiver has already been appointed by another court, with equal jurisdiction, and was in possession at the time of the appointment.
- ID.—REQUIREMENT OF BOND—ABUSE OF DISCRETION.**—The appointment of a receiver to take the property and business out of the hands of a person in possession, and claiming ownership thereof, without requiring a bond from the plaintiff, is, in most cases, a gross abuse of discretion.
- ID.—UNAUTHORIZED RECEIVERSHIP OF CORPORATION—PROHIBITION.**—In the absence of a statutory authority, a receiver cannot be appointed during the pendency of an action to displace the management of the corporation by its directors; and there is no statutory authority under section 564 of the Code of Civil Procedure, or any other provision of the code, or any legislative enactment, to seize the property of the corporation out of the hands of the constituted management, and place it in the hands of a receiver during the pendency of an action; and prohibition is the proper remedy to prevent the attempted exercise of such receivership.
- ID.—CORPORATION FORMED BY PARTNERSHIP—RULE AS TO RECEIVERSHIP UNCHANGED.**—Where the complaint upon which the receiver was appointed shows the organization of a corporation, and a conveyance to it of all the mining property owned by the partnership, and the issuance of shares to the corporation through the several partners, and that the corporation has carried on the business of operating the mines, and has the legal title thereto and right to possession thereof, an averment that the corporation is a mere medium of the partnership, and not an independent corporation, and that the fraud was committed by one of the members of the partnership upon another in the distribution of the shares of the corporation, does not change the rule that the court has no power to take the control of the property and business of the corporation out of the corporate management and give it to a receiver; nor is any new power given the court by the averments of the complaint.
- ID.—INJUNCTION AGAINST WITHDRAWING OF MONEYS OF CORPORATION—REMEDY—MOTION—APPEAL—PROHIBITION.**—An injunction to restrain a corporation and its officers from withdrawing moneys deposited in certain banks in the name of the corporation, or in the name of a receiver appointed in another action, and from selling any of the mines of the corporation, or any interest therein, although granted without notice, does not have the effect to suspend the general and ordinary business of the corporation, and the remedy therefor is by motion in the superior court to dissolve the injunction, and an appeal from the order denying the motion; and its enforcement cannot be prevented by a writ of prohibition.

**PETITION** in the Supreme Court for a writ of prohibition to the Superior Court of the City and County of

San Francisco. JAMES M. TROUTT and JAMES M. SEAWELL, Judges.

The facts are stated in the opinion of the court.

*Wheaton, Kalloch & Kierce*, for Petitioners.

As the order appointing the receiver was void, in so far as it in terms authorized him to take the property of the corporation from the possession of the corporation, all proceedings to punish Fischer and Wheaton for contempt for refusing to deliver the property of the corporation to the receiver were also void, and the superior court is proceeding *coram non judice* in proceeding to punish them for so doing. (*Harrison v. Hebbard*, 101 Cal. 152; *Ex parte Rowland*, 104 U. S. 617; *People v. O'Neil*, 47 Cal. 109.) Before they could have been held for contempt they must have been ordered to deliver the property to the receiver, and must have refused to obey the order. (Beach on Receivers, sec. 241.) The power of the receiver, Peckham, was coextensive only with the power of the court which appointed him. (High on Receivers, secs. 150, 162 a; *Parker v. Browning*, 8 Paige, 388; 35 Am. Dec. 717, quoted in High on Receivers, sec. 150.) The receiver cannot take property forcibly from third parties. (High on Receivers, secs. 145, 149, 150, 457.) The court in San Francisco acted without jurisdiction, and the facts of the case bring it within the following decisions of this court: *Neall v. Hill*, 16 Cal. 145; 76 Am. Dec. 508; *French Bank Case*, 53 Cal. 495; *Havemeyer v. Superior Court*, 84 Cal. 327; 18 Am. St. Rep. 192; *Ex parte Hollis*, 59 Cal. 405; *Ex parte Casey*, 71 Cal. 269, 270. When property was exempt from execution the receiver of a debtor had no right to take it. (High on Receivers, secs. 441, 442.) There could be no interference with the possession of the receiver until he had obtained possession of the property, and for this reason the authorities that make any interference with the possession of the receiver a contempt do not apply in this case. (Beach on Receivers, sec. 239.)

If the property was the property of the corporation, the writ which is prayed for should issue. (*Neall v. Hill, supra; French Bank case, supra; Bateman v. Superior Court*, 54 Cal. 285; *Smith v. Superior Court*, 97 Cal. 348; *Havemeyer v. Superior Court, supra; Havemeyer v. Superior Court*, 87 Cal. 267; *Savings Bank v. Superior Court*, 103 Cal. 32, 33; *Long v. Superior Court*, 102 Cal. 449; *State Inv. etc. Co. v. Superior Court*, 101 Cal. 135, 149, 150; *Harrison v. Hebbard, supra; Ex parte Hollis, supra; Ex parte Casey, supra.*) A receiver can be appointed to take the corporation property from the corporation only in the cases where it has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate existence. (Code Civ. Proc., sec. 565; *State Inv. etc. Co. v. Superior Court, supra.*) The courts do not act in these special proceedings because the facts are merely alleged, but because the facts have become established by default or admission. (*Loaiza v. Superior Court*, 85 Cal. 11; 20 Am. St. Rep. 197.) Want of jurisdiction appearing in the complaint, or probably anywhere in the record, is fatal. (*Watts v. White*, 13 Cal. 321; *Havemeyer v. Superior Court, supra; Gray v. Hawes*, 8 Cal. 562.) Jurisdictional facts must be alleged and proven. (*Lane v. Pferdner*, 56 Cal. 122; *Danielwitz v. Temple*, 55 Cal. 42.) The want of jurisdiction of the subject matter of the writ or proceeding cannot be waived, and an objection based thereon may be successfully raised at any time, and even for the first time, after an appeal has been taken to the supreme court. (Code Civ. Proc., sec. 434; *Mott v. Smith*, 16 Cal. 533, 555; *Halleck v. Jaudin*, 34 Cal. 167, 173; *In re Grove Street*, 61 Cal. 438.) The articles of incorporation do not, in terms or by implication, declare that the purpose for which the corporation was formed was to serve as the name or agent of a partnership. (Civ. Code, sec. 290; *Vandall v. South San Francisco etc. Co.*, 40 Cal. 83; *Coleman v. San Rafael etc. Co.*, 49 Cal. 517; Const., art. XII, sec. 9.)

*H. S. Foote, and Rodgers & Paterson, for Respondents.*

It is only where the court under no circumstances has jurisdiction to issue such an order as the one appointing a receiver that any one is authorized to defy its authority. (*In re Cohen*, 5 Cal. 495.) The court will not, in a proceeding to punish for contempt, review the questions which were passed upon when the receiver was appointed. It is sufficient for the purpose of such a proceeding that the receiver was appointed, and that there is an interference with his possession, or a defiance in any respect of the authority of the court. (Beach on Receivers, secs. 246, 247.) No one is allowed to interfere with the officer of the court, however erroneously or improvidently the order may be made. (High on Receivers, secs. 164, 165, 168; *United States v. Murphy*, 44 Fed. Rep. 39; *Ex parte Walker*, 25 Ala. 108; 2 High on Injunctions, 1416, 1417, 1430, 1459.) The judgment of the superior court in *Loftus v. Fischer* could not determine Behlow's interest in the partnership property. He had no pleading upon which such interest could be determined. The decree as to him is void on its face, but if this were not so, the judgment in that action could not be considered in the action brought by Behlow in the superior court of the city and county of San Francisco. (*Naftzger v. Gregg*, 99 Cal. 83; 37 Am. St. Rep. 23; *Story v. Story etc. Co.*, 100 Cal. 41; *Brown v. Campbell*, 100 Cal. 635-47; 38 Am. St. Rep. 314; *In re Blythe*, 99 Cal. 472; Code Civ. Proc., sec. 1049.) The suspension of the general and ordinary business of a corporation, which is referred to in section 531 of the Code of Civil Procedure, is an injunction which suspends the ordinary and general functions of a corporation. That section does not apply to this case. (*Emeric v. Alvarado*, 64 Cal. 625.) If an act of the corporation is unlawful its act can be restrained without notice to the corporation if the act when performed would be injurious to the applicant. (*Hobbs v. Amador etc. Canal Co.*, 66 Cal. 161; *Golden Gate etc. Co. v. Super-*

ior Court, 65 Cal. 187.) In the case at bar there can be no doubt that upon the allegations of the bill the corporation is the mere agent of the partnership. (*Chater v. San Francisco Sugar Co.*, 19 Cal. 241; *Shorb v. Beaudry*, 56 Cal. 450; *Cornell v. Corbin*, 64 Cal. 197; *Clute v. Loveland*, 68 Cal. 258.)

MCFARLAND, J.—This is an original petition here by Jacob A. Fischer, M. A. Wheaton, and the Consolidated Golden Gate and Sulphuret Mining and Development Company, a corporation, for a writ of prohibition to the superior court of the city and county of San Francisco, and the Hon. James M. Troutt and Hon. James M. Seawell, judges of said court, and also to John F. Pinkham, a receiver appointed by said Troutt as judge of said court in a certain action therein pending in which Charles J. Behlow is plaintiff and the said Jacob A. Fischer *et al.* defendants, commanding said court and judges, and said Pinkham, to desist from taking any further proceedings, etc., under the order appointing said Pinkham receiver, or under a certain injunction issued in said action, or under an order and citation by which it is proposed to punish said petitioners, Fischer and Wheaton, for contempt in refusing to deliver certain real property to said receiver. The proceeding in prohibition here was submitted upon a demurrer to the petition, and also an answer filed by said judges, and a separate answer by said receiver Pinkham.

The complaint in the action in which Pinkham was appointed receiver was filed April 19, 1895. The theory and averments of this complaint are (briefly) that in the year 1889 the plaintiff Behlow, together with the defendants Fischer and F. C. Loftus and William C. Long, constituted a copartnership, and that as copartners they owned the mining claims and properties involved in this proceeding and situated in Tuolumne county; that on or about September 1st of said year, 1889, the said copartners, for the purpose of carrying on



the business of said copartnership *by said copartnership* under a corporate name, agreed to organize a corporation to be called "The Consolidated Golden Gate and Sulphuret Mining and Development Company"; that the said parties should convey and transfer to said corporation their mines and mining property; that the capital stock of said corporation should consist of sixty thousand shares; that forty-eight thousand shares should be divided between said copartners and issued to them individually in certain proportions agreed upon, and that the remaining shares should be afterward disposed of as they might determine; but that said corporation when organized should not be an independent corporation, and should be "but the name and mere medium of the copartnership in carrying on its business, and that the copartnership should be the real and beneficial owner of the property transferred into the name of said corporation." It is averred that such corporation, with the name before stated, was duly organized on or about the twentieth day of August, 1889, and that on September 4, 1889, the said copartners by deed conveyed, assigned, and transferred to said corporation "all the said mining claims, real property, water rights, water ditches, water privileges, stamp mill, hoisting works, furnace, amalgamating plant, engine, boilers, water wheel, tools, implements and other property," except a certain mining and placer claim described, "and all other property of whatever kind or nature situate on, or in the course of erection, or about said mining claims and real property," and also "the moneys of said corporation then on hand." It is then averred that plaintiff Behlow did not get all the shares of the stock of the corporation to which he was entitled; that Fischer wrongfully procured certain shares to be issued to Behlow for his (Fischer's) benefit; that he afterward, by false representations of the value of the mining property, induced Behlow to sell him twenty-two thousand shares of said stock, for less than their real value; that said Fischer, as president of said corporation and

general manager, together with the majority of the board of directors, whom he controls, and who have conspired with him, have misappropriated dividends and caused wrongful certificates of stock to be issued, and will so conduct the business that it will become valueless, etc., to the irreparable injury of plaintiff. There are many other averments which need not be here mentioned, some of which, however, will be noticed hereafter. The prayer is that Fischer be required to account for moneys and personal property "of the copartnership or corporation" unlawfully appropriated by him or his agents; that certain stock held by the defendant, Rozalia Fischer, be adjudged to be the property of the said copartnership; that the defendants be enjoined from doing certain things with respect to the said mining properties; and that a receiver be appointed to take possession and charge of all said mining properties, "and to *work, operate, and develop* said mines during the pendency of this action, and to take possession of and hold all the net profits thereof, subject to the further order of this court." The court, on April 20, 1895, in accordance with said prayer, appointed said Pinkham receiver, who went to Tuolumne county to take charge of said property, and demanded the same of said petitioner Fischer, who was in possession for said corporation under a decree and order of the superior court of Tuolumne county. The orders granting the injunction and appointing the receiver were made without any notice to petitioners, or any bond from plaintiff on the appointment of the receiver. Fischer, on the advice of Wheaton, who was counsel for Fischer and for said corporation, refused to deliver possession, whereupon a citation was issued to them both to show cause why they should not be punished for contempt.

In addition to the facts set out in said complaint, the petition for this writ contains averments of these other facts: In January, 1892, the said Behlow and others commenced a certain other action in the superior court

of Tuolumne county against the said Fischer, said corporation, and others. (For convenience we will call the action last above named the Tuolumne case, and the second action, in which Pinkham was appointed receiver, the San Francisco case.) The Tuolumne case was substantially the same as the San Francisco case. In the former case the court, after a trial, rendered a judgment in favor of the plaintiffs therein; but upon an appeal to this court the judgment was reversed. (See *Behlow v. Fischer*, 102 Cal. 208, where the facts are very fully stated in the opinion of Mr. Justice Harrison.) After the *remittitur* went down the pleadings were several times amended, and it was finally tried the second time upon the fourth amended complaint, in which Ed. C. Loftus and his wife Mariam were the sole plaintiffs, and the said Behlow was a defendant, and made answer. In that case one Lane had been appointed receiver, and continued to act as such, having possession and control of said property, until after the appointment of Pinkham in the San Francisco case. The said Tuolumne case was tried in the superior court of that county during the months of January and February, 1895; and on April 16, 1895, the said court made and entered its findings and decree, wherein it was found and adjudged, among other things, that said corporation never agreed to act, and never did act, as the agent of said copartnership, nor was any copartnership business carried on through said corporation; that it has been the owner of said mining properties since September, 1889, and since then was in full possession thereof, working it as a corporation exclusively in its own right, until possession was taken by said Lane as receiver; that the title of said corporation to said mining properties be quieted as against all of the defendants therein, including said Behlow; that all of said defendants be adjudged to have no right, title, or interest in or to said properties; and that said defendants, including said Behlow be, and they were, enjoined from claiming or asserting any right, title, or interest in or to said mining properties, or any part thereof, ad-

versely to said corporation. After entering this decree, the court, on April 20, 1895, made an order that the receiver, Lane, deliver possession of said property to the said corporation and to Fischer as its agent and manager, and such possession was given about 5 or 6 o'clock on April 23d. Immediately afterward, Pinkham, receiver in the San Francisco case, demanded possession. These averments of the petition are substantially admitted by the respondents herein, except that they assert that certain rulings of the court in the Tuolumne case, with respect to the pleadings of said Behlow in said case, and evidence offered, prevented him from having his rights properly adjudicated therein. He was a party to that action, however, and any wrong rulings of the court touching his pleadings or evidence were mere errors to be corrected upon appeal.

Petitioners contend that the said admitted averments of their petition, together with the fact that no previous notice had been given the corporation, show a want of jurisdiction either to grant the injunction or appoint the receiver.

The general rule, no doubt, is that so harsh a measure as the appointment of a receiver to take property out of one's possession without trial will not be indulged in by a court without previous notice to the defendant. It would be unjustifiable, except where it clearly appeared that irreparable injury would be done during the few days necessary for a hearing on notice; and even in such an extreme case, a temporary injunction would usually be sufficient. "A motion to appoint a receiver will not be entertained unless notice has been given to the defendant, if practicable, and the appointment will not be made without notice, save in case of irreparable pending injury." (Beach on Receivers, sec. 141, and notes.) Indeed, there are authorities to the point that a court has *no power* to appoint a receiver where one had already been appointed by another court of equal co-ordinate jurisdiction and was in possession. In Beach on Receivers, section 15, it is said: "As between courts

of the same state, when a receiver has been appointed by one court, and has obtained possession of the property or fund over which he was appointed, he cannot be in any manner interfered with by a receiver subsequently appointed, or by any proceeding whatever in any other action brought in any court." (See, also, *Merrill v. Lake*, 16 Ohio, 405; 47 Am. Dec. 377; *Stearns v. Stearns*, 16 Mass. 167; *Pugh v. Brown*, 19 Ohio, 211.) In *Young v. Montgomery etc. Co.*, 2 Wood, 606, the court says: "If there are any adjudicated cases which would authorize this court to interfere with the possession of a receiver appointed by another court having jurisdiction, and who is in the actual possession of the property, they have never fallen under my observation. The authorities all sustain the opposite doctrine"—citing a number of cases. Respondents contend that the rule does not apply here because the second receiver did not attempt to take possession until after the first receiver had delivered possession to the corporation. However, as the first receiver was in possession when the order of the San Francisco court appointing Pinkham was made, it is doubtful if the validity of said order can be determined except upon the facts existing when it was made. But whether these matters—suggested by said averments in the petition—involve considerations of mere error and abuse of discretion, or raise issues of jurisdiction, is a question which we do not deem it necessary to be here decided; because, in our opinion, the averments of the complaint show a want of power to appoint the receiver. (We may remark, however, that the appointment of a receiver to take property and business out of the hands of persons in possession and claiming ownership thereof, without requiring a bond from the plaintiff in the action, would in most cases be a gross abuse of discretion.)

It is to be observed that the order complained of makes Pinkham receiver of the corporation. He is to take possession of the mining properties of the corporation, and to "develop, work, operate, and run said min-

ing claim and mill, and to employ such persons and laborers as may be necessary to continue the development and business of said mines and mining claims, and to pay out and disburse such moneys as may be necessary to work, operate, develop, and carry on the business of said mines," etc. This is to displace the corporate management, and to put into its place the receiver of the court; and it seems to be well settled that a court has no power to do this except in cases where it has been given by statute, and that prohibition is a proper remedy for its attempted exercise. (*Neall v. Hill*, 16 Cal. 145; 76 Am. Dec. 508; *French Bank case*, 53 Cal. 495; *Havemeyer v. Superior Court*, 84 Cal. 327; 18 Am. St. Rep. 192; *Savings Bank v. Superior Court*, 103 Cal. 34; *Harrison v. Hebbard*, 101 Cal. 152.) In *Neall v. Hill*, *supra*, where a receiver had been appointed to take possession of the property of a corporation, the court said: "It is well settled that a court of equity, as such, has no jurisdiction over corporate bodies for the purpose of restraining their operations or winding up their concerns. We do not find that any such power has ever been exercised in the absence of a statute conferring the jurisdiction." In the *French Bank case*, *supra*, the court say: "Irrespective of the effect of the fifth subdivision of section 564 of the Code of Civil Procedure, which will be presently considered, there is no jurisdiction vested in courts of equity to appoint a receiver of the property of a corporation in a suit prosecuted by a private person. This is only to say that there is no jurisdiction vested in these courts in such a case to dissolve a corporation; for the power of a receiver, when put in motion, of necessity supersedes the corporate power." (Holding directors accountable for abuse of their trust is, of course, a different thing.) The general authorities on the subject are to the same effect. Beach on Receivers, section 403, speaking of receivers of corporations, says: "It is, in the first place, to be remarked that the jurisdiction to appoint a receiver in these cases is wholly statutory." The question to be

determined, therefore, is whether or not there is any statutory provision under which power is given a court to appoint a receiver in a case like the one at bar during the pendency of the suit.

The question last stated was exhaustively considered in the *French Bank case, supra*. In that case a receiver had been appointed by the trial court, in a suit brought by creditors of a corporation alleged to be insolvent; and, upon *certiorari*, it was held that the court had no jurisdiction to make the appointment. In that case it was held that such jurisdiction was not conferred by any subdivision of section 564 of the Code of Civil Procedure, or by any other provision of said code, or any legislative enactment. There it was sought to maintain the appointment upon the ground, among others, that the corporation was insolvent. In the case at bar the respondents do not base their right upon the insolvency of the corporation; but if they did, the court declared in the *French Bank case, supra*, that "there is no statute of this state, none to which we have been pointed, which undertakes to confer upon a private person, either as stockholder or creditor, the right to maintain an action to dissolve a corporation upon the ground that it is insolvent, or to obtain relief by *seizing its property out of the hands of the constituted management, and placing it in the hands of a receiver.*" And this being so, what other provision of the codes or of the statutes is there, which confers the power to appoint a receiver under the facts presented in the case at bar? We cannot see any, and have not been referred to any, which confers such power. How is plaintiff's position any better than that of a creditor or stockholder? Indeed, plaintiff bases his right very largely upon the fact that he is a stockholder of the said corporation.

It is difficult to understand upon what ground the right to a receivership is based in the case at bar, or what that position is which, it is contended, lifts the plaintiff in the case above the principles hereinbefore stated, and enables him, through the agency of a re-

ceiver, to take from a corporation the management of its affairs, during the pendency of an action. Respondents seem to contend that the whole doctrine is swept aside by the mere *averment* that the said Consolidated Golden Gate and Sulphuret Mining and Development Company is a mere medium of a partnership and *not* an independent corporation. But the complaint in the San Francisco case admits and declares that said company was duly organized as a corporation in 1889; that in said year all the mining properties involved were conveyed to said corporation, and that it has ever since been the owner in fee of said properties; that its capital stock was issued to the members of the partnership, except the shares reserved; that said capital stock is of great value—nineteen thousand two hundred shares thereof being alleged to be worth “not less than one hundred thousand dollars (\$100,000)””; that ever since its organization in 1889 said corporation has carried on the business of operating said mining properties, except when said receiver Lane—appointed in the Tuolumne case—was in possession thereof; and that said corporation “asserts and claims that it is the owner and entitled to the possession of said mines, mining claims, moneys, and other property, and that it is an independent corporation, and that said partnership and the members thereof have no right, title, or interest, beneficial or otherwise, in or to said mines, mining claims, moneys, or other property.” Here then, upon the face of the complaint, we have the case of a corporation, *de jure* and *de facto*, having the legal title to certain mining properties, carrying on the business of operating the same as mines, and asserting full ownership and right of possession thereof; and this is the very case in which, under the authorities, a court has no power, during the pendency of a suit by a private person, to take the control of the property and business of the corporation out of the corporate management and give it to a receiver. And these facts being admitted and declared, the rule is not changed, nor is any new power given the court, by



the other averments of the complaint. Otherwise, the rule would be worthless; and any corporation in the state, acknowledged to be in the legal ownership and possession of certain property and business, could be dispossessed of that property and business through the appointment of a receiver whenever a party saw fit to make some averment similar to those contained in the complaint in *Behlow v. Fischer, supra*. The position of the plaintiff in that case is no better than that of a creditor or stockholder—neither of whom could rightfully procure the appointment of a receiver during the pendency of an action against a corporation.

The authority relied upon by respondents is the case of *Fischer v. Superior Court*, 98 Cal. 67. That was a petition for a writ of prohibition, commanding the superior court of Tuolumne county to desist from acting under an order appointing said Lane receiver in the action hereinbefore designated as the Tuolumne case, and the writ was denied. But that decision was made upon the basis that there had been a trial and adjudication of the rights of the parties, and that the appointment of Lane was part of the final judgment and decree. He had been appointed before judgment; but judgment had been rendered in favor of plaintiffs (erroneously as it afterward appeared) and by the judgment he had been reappointed. This court, in its opinion in *Fischer v. Superior Court, supra*, say: "The application for the writ, and the order to show cause, was made prior to the rendition of the aforesaid judgment, but *that judgment includes the authority* under which the receiver is now acting, and for that reason we shall address ourselves to the legal sufficiency of *that authority*." The additional words, "although the jurisdictional question presented is *probably* the same under either order," in no way change the *decision* or make it authority upon the question of the power to appoint a receiver before judgment. The court further says: "It will not be necessary to enter into a discussion of the principles and authorities relied upon to sustain the proposition that a court of

equity cannot appoint a receiver to take possession of the property of a corporation *pending litigation*, for petitioner's case fails before it reaches that position." Now, the power of a court to appoint a receiver under subdivision 3 of section 564 of the Code of Civil Procedure, "after judgment, to carry the judgment into effect," is a very different thing from the power sought to be exercised in the case at bar. Whether that subdivision applies to a judgment obtained against a corporation in a suit brought by a private person is not a question arising here; but *Fischer v. Superior Court, supra*, is not authority to the point that in such a suit a receiver can be appointed pending the action. The judgment upon which that decision was based was afterward reversed, and a subsequent judgment rendered in the Tuolumne case adjudging that said company was an independent corporation owning said mining properties, and operating them for itself and on its own account.

Our conclusion is that there was no jurisdiction in the court to make the order appointing the said Pinkham receiver in the said case of *Behlow v. Fischer, supra*, and that, under the views above expressed, a writ should issue commanding the respondents herein to desist from taking any further proceedings under said order, or under the order citing petitioners to answer for contempt. This makes it unnecessary to consider other points made by petitioners—as, for instance, that petitioners violated no order or process of the court, because there was no order or process commanding them to deliver property to the receiver, and that they did not interfere with the possession of the receiver because he had no possession.

The injunction complained of restrains the petitioners, and all of the defendants in the San Francisco case, from withdrawing certain moneys then deposited in certain banks or elsewhere, in the name of said corporation, or in the name of said Lane, and from selling any of the mines of the corporation, or any interest therein. Although this injunction was granted with-

out notice, we cannot say that its effect is "to suspend the general and ordinary business of a corporation," and that, therefore, it is invalid under section 531 of the Code of Civil Procedure. The remedy would be a motion in the superior court to dissolve the injunction, and an appeal from an order denying said motion. As to said injunction, the prayer of the petition is denied.

It is ordered that a peremptory writ of prohibition issue, commanding the respondents to desist from taking any proceedings under the order appointing John F. Pinkham receiver, and under the order citing petitioners for contempt, as prayed for in the petition.

VAN FLEET, J., TEMPLE, J., HENSHAW, J., and HARRISON, J., concurred.

BEATTY, C. J., concurred in the judgment.

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[No. 19587. Department Two.—November 23, 1895.]

**CHARLES L. SMITH, APPELLANT, v. BARCLAY  
HAZARD, RESPONDENT.**

**STREET IMPROVEMENT—PROTEST OF OWNERS—CONSTRUCTION OF STATUTE.**

Under the Street Improvement Act of 1885, as amended in 1891, the city council has authority to order the grading or other improvement of one of two adjoining ungraded blocks intervening between and bounded at each end by graded blocks, notwithstanding the protest of the owners of a majority of the frontage of the property fronting on the proposed work or improvement; and it is not necessary that the whole intervening unimproved space must have been improved under one resolution of intention and one contract; but the council has authority to order the whole or any part of the intervening ungraded blocks to be graded or improved, regardless of objections by owners of lots fronting on the proposed improvement.

**ID.—COMPLETION OF WORK—SLIGHT DEFECT—APPEAL TO COUNCIL.**—The only remedy for a slight defect in the work at the time of its acceptance by the superintendent of streets, in leaving a narrow strip ungraded, which was afterward graded by the owner of the lot, is by an appeal to the city council, and it cannot be objected to in an action to recover a street assessment for work done under the contract.

**ID.—PUBLICATION OF RESOLUTION OF INTENTION—INSERTION ON SUNDAY.**—Under section 3 of the Street Improvement Act, requiring the resolution of intention to be published by two insertions in one or more daily, semi-weekly, or weekly newspapers published and

circulated in the city, the publication of the resolution on Saturday and Sunday consecutively in a daily newspaper published and circulated in the city, is a liberal compliance with the statute, which does not except Sundays, and the publication is sufficient.

APPEAL from a judgment of the Superior Court of Santa Barbara County. W. B. COPE, Judge.

The facts are stated in the opinion.

W. S. Day, for Appellant.

The street improvement law should be liberally construed, and the council had jurisdiction to improve the whole or any part of the intervening space. (Street Improvement Law, secs. 2, 3, 11, 12.)

Richards & Carrier, for Respondent.

These proceedings, by which property may be divested, are *in invitum* and must be strictly pursued. (*Dehail v. Morford*, 95 Cal. 460; *Brock v. Luning*, 89 Cal. 316; *Perine v. Forbush*, 97 Cal. 305; *Treanor v. Houghton*, 103 Cal. 53.) The written objection of the owners of a majority of the frontage on the line of the proposed improvement worked an absolute bar to further proceedings of the council for six months; during that period their jurisdiction was completely suspended. (Finlason on Street Laws, 28-31; *Dougherty v. Harrison*, 54 Cal. 428; *Treanor v. Houghton*, *supra*; *McDonald v. Dodge*, 97 Cal. 112.)

VANCLIEF, C.—This is an action to recover a street assessment of two hundred and eighteen dollars and forty-six cents for work done by plaintiff on Micheltorena street, in the city of Santa Barbara, under contract with the superintendent of streets.

On June 13, 1893, the city council, by resolution, declared its intention "to grade, curb, and gutter" said street, "from the northeasterly line of Chapala street to the northeasterly line of De la Vina street, a distance of one block, and duly posted and published said resolution.

Thereafter, on July 1, 1893, the owners of a majority of the frontage on the proposed improvement in due form protested against said improvement; but the city council disregarded their protest, and without delay proceeded in the matter as if no objection or protest had been made.

The court below ruled that the protest was a bar to further proceedings for six months; and that all subsequent proceedings, including the assessment, were therefore void. Whether or not this ruling was correct is the principal question discussed by counsel on this appeal. The appellant contends that it was error.

The block improved was one of two adjoining ungraded blocks intervening between and bounded at each end by graded blocks; and it is not denied that the council had power to improve the two ungraded blocks thus situated, notwithstanding the protest; but respondent contends that the whole intervening unimproved space of two blocks must have been improved under one resolution of intention and one contract; and that the council was not authorized to improve each of the two intervening blocks under a distinct resolution of intention or a distinct contract, in disregard of a protest by the owners of a majority of the frontage, even though each of the intervening blocks was being so improved at the same time.

I think, however, that this is a misconstruction of the street law. Section 2, page 196, of the Street Improvement Act of 1885, as amended in 1891, confers upon the city council general authority "to order the whole or any portion, either in length or width of streets," to be improved, etc. But section 3 of the same act limits this general authority as follows:

"The owners of a majority of the frontage of property fronting on said proposed work or improvement, where the same is for one block or more, may make a written objection to the same within ten days after the expiration of the time of the publication and posting of said notice, which objection shall be delivered to the clerk

of the city council, . . . and such objections so delivered and endorsed shall be a bar for six months to any further proceedings in relation to the doing of said work, or making said improvement, unless the owners of one-half or more of the frontage, as aforesaid, shall meanwhile petition for the same to be done."

Farther on in the same section an exception to the above limitation is expressed as follows: "And when not more than two blocks, including street crossings, remain ungraded to the official grade, or otherwise unimproved, in whole or in part, and a block or more on each side upon said street has been so graded or otherwise improved, or when not more than two blocks at the end of a street remain so ungraded or otherwise unimproved, said city council may order any of the work mentioned in this act to be done upon said intervening ungraded or unimproved part of said street, or at the end of a street, and said work upon said intervening part or end of a street shall not be stayed or prevented by any written or other objection, unless such council shall deem proper."

The facts of the case at bar bring it clearly within this exception, and exclude it from the above limitation upon the power of the council; and, therefore, the authority of the city council to improve the street through said two intervening blocks must be that conferred by section 2 of the act, namely, "to order the whole or any portion" thereof to be graded or otherwise improved, regardless of objections by owners of lots fronting on the improvement.

The plaintiff pleaded and offered to prove that both intervening blocks were being improved at the same time, though under distinct proceedings and contracts, and that the improvement of both had been completed; but the court rejected all proffered evidence of this character, to which plaintiff excepted, and contends here that the exclusion of such evidence was error. But if the views above expressed are correct, the proffered evidence was immaterial and its rejection harmless.

Counsel for respondent contends that the superintendent accepted the work before it was completed according to contract, claiming that there was a narrow strip of an average width of six inches, on which stood a fence in front of one of the lots, ungraded at the time work was accepted, though it was afterward graded by the owner of the lot. The only remedy for this attenuated defect was to be had by an appeal to the city council. (*Jennings v. Le Breton*, 80 Cal. 8.)

Section 3 of the act requires the resolution of intention to make the improvement to be "published by two insertions in one or more daily, semi-weekly, or weekly newspapers published and circulated in said city," etc. The resolution in this case was inserted on two consecutive days—Saturday and Sunday—in a daily newspaper published and circulated in said city of Santa Barbara.

It is contended by respondent that the publication was insufficient, because the last insertion was on Sunday.

The publication was a literal compliance with the statute—"two insertions in a daily newspaper," Sundays not excepted—a series of acts, and not a publication for a specified period.

I think the publication was sufficient (*Savings etc. Society v. Thompson*, 32 Cal. 347-54), and that the judgment should be reversed and the cause remanded for a new trial.

BELCHER, C., and SEARLS, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed and the cause remanded for a new trial.

McFARLAND, J., HENSHAW, J., TEMPLE, J.

Hearing in Bank denied.

[No. 18404. Department One.—November 23, 1895.]

**VICTOR J. GREGORY, RESPONDENT, v. J. J. SPIEKER, APPELLANT.**

**SALE—GOODWILL—RESTRAINT OF TRADE—FRAUD—STATUTE OF LIMITATIONS.**—The seller of a medical compound and of the goodwill of the business, who agrees in the contract of sale not to manufacture or sell the compound within a particular county, is guilty of fraud in secretly and clandestinely manufacturing and selling the identical compound by a different name, and through the instrumentality of a third person, and the statute of limitations does not commence to run against the right of the purchaser to enjoin the violation of the contract and to recover damages for the fraudulent breach thereof, until the discovery by him of the facts constituting the fraud.

**ID.—COVENANT FOR LIMITED RESTRAINT OF TRADE.**—Under sections 1673 and 1674 of the Civil Code, a provision in a contract of sale of the goodwill of a business, by the terms of which the seller agrees not to engage in the business in a particular county, without limiting his covenant to the time during which the buyer might carry on the business, is not entirely void, but is binding on and enforceable against the seller so long as the buyer or any person deriving title from him carries on a like business in the county.

**ID.—CONSTRUCTION OF CONTRACT—INJURY TO GOODWILL.**—A contract of sale whereby the seller transfers "all right, title, and goodwill of the bitters known as Robert's Kidney and Liver Bitters," and covenants "not to manufacture or sell any of said Robert's Bitters" in a specified county, is a sale of the liquid known when compounded as Robert's Bitters, and not merely of the name by which it was known; and representing to the buyer's customers that the same preparation by a different name was superior to Robert's Bitters, tends to injure the goodwill of the business.

**ID.—MEASURE OF DAMAGES.**—In an action by the buyer to recover damages for such a breach of the contract of sale, where there has been no infringement of a trademark, the measure of damages is the value of the business lost to the buyer, and not the gain to the seller.

**APPEAL** from a judgment of the Superior Court of Sacramento County. **A. P. CATLIN**, Judge.

The facts are stated in the opinion.

*D. E. Alexander*, and *Albert M. Johnson*, for Appellant.

*Armstrong & Bruner*, for Respondent.

**BRITT, C.**—Action begun October 4, 1892, to enjoin the violation of a contract, and to recover damages for



the fraudulent breach thereof. The following facts, among others, were alleged by plaintiff and found by the court below: Defendant owned a liquid compound known as "Robert's Kidney and Liver Bitters" and the formula for the manufacture thereof, and the goodwill of the business of making and vending the same; on January 7, 1884, while engaged in such business at the county of Sacramento, and having then a large sale of such bitters in said county and throughout this state, the defendant made a bill of sale to one Lee, by the terms of which he sold and transferred to Lee all right, title, and goodwill of the said bitters theretofore manufactured by him; also the recipe for manufacturing the same; and all labels, printing matter, boxes, etc., pertaining to the manufacture thereof. The instrument concluded as follows: "And I furthermore agree not to manufacture or sell any of said Robert's Kidney and Liver Bitters in this county. J. J. Spieker." Said Lee was the agent of plaintiff in this transaction, and on the following day, January 8, 1884, he assigned to plaintiff the property and rights acquired by him under said instrument of January 7th. Thenceforward the plaintiff manufactured and sold said bitters, and is yet so engaged.

About February 5, 1884, defendant, with intent to injure plaintiff's business, combined and conspired with one T. M. Lash to manufacture and sell the same bitters under the name of "Lash's Kidney and Liver Bitters," and thereafter for several years such combination, first under the style of T. M. Lash & Co., and later under that of Lash's Bitters Company, manufactured and sold such bitters in said county and throughout the state; defendant then dissolved his connection with Lash, but, under the style of Lash's Bitters Company, continued, until the time of the commencement of this action, the same business of making and selling Robert's Kidney and Liver Bitters by the name of Lash's Kidney and Liver Bitters. Defendant fraudulently concealed from plaintiff the fact of his interest in the business of T. M. Lash & Co. and Lash's Bitters Company, and the fact

also that said Lash's Bitters were compounded of the same ingredients as the said Robert's Bitters, until he divulged such facts upon the trial of a certain action between him, Spieker, and said Lash in April, 1892, up to which time plaintiff was without knowledge or information thereof. By reason of false representations made by defendant to plaintiff's customers to the effect that Lash's Bitters differed from, and were 'superior to, Robert's Bitters—he knowing that they were compounded of the same ingredients—said customers, or some of them, were induced to purchase the former instead of the latter, whereby the profits of plaintiff's business were mostly cut off. Some further history of this same compound, and the dissensions of those concerned in its preparation and sale, may be found in *Spieker v. Lash*, 102 Cal. 38.

Defendant pleaded, among other matters, the bar of the statute of limitations—sections 337, 443, and subdivision 4 of section 338 of the Code of Civil Procedure. The court held that the action was not barred, and rendered judgment perpetually restraining defendant from manufacturing or selling in Sacramento county the said Robert's Kidney and Liver Bitters, or any preparation compounded of its constituents, and from conducting the sale of Lash's Bitters in such manner as to interfere with the goodwill of Robert's Bitters anywhere in the state, and from endeavoring to draw off plaintiff's customers; also that plaintiff recover all the net profits made by defendant in the sale of Robert's under the name of Lash's Bitters from February 5, 1884, to October 4, 1892; which profits were found by means of a reference and accounting had under order of the court to be the sum of fifty-one thousand eight hundred and seventy-two dollars. The appeal is on the judgment-roll, no evidence being brought up.

It is argued by appellant that plaintiff's cause of action lies solely in defendant's breach of contract; that the fraud charged and found is merely for the purpose of excusing delay in the commencement of the action,

and is not the substantive ground upon which relief is sought; hence, that the action is not saved by the provision of section 338 of the Code of Civil Procedure, that in an action for relief on the ground of fraud the cause of action is not to be deemed to have accrued until the discovery of the facts constituting the fraud. But we are of opinion that the facts as found by the court show that fraud was so ingrained with the breach of contract by defendant that the action, as regards the bar of the statute, at least, must be treated as one for relief on the ground of fraud. The breach was accomplished underhandedly, by secret confederacy with another, and the use of his name to cloak the movements of the defendant; and by deceit inducing third persons to believe that defendant's product differed from, or was superior to, that of plaintiff; deception practiced on one person to the injury of another may be actionable fraud as to the latter. (*Blakeslee v. Starring*, 34 Wis. 538.)

Sections 1673 and 1674 of the Civil Code read as follows:

"SEC. 1673. Every contract by which any one is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided by the next two sections, is to that extent void."

"SEC. 1674. One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or a part thereof, so long as the buyer or any person deriving title to the goodwill from him carries on a like business therein."

Here Spieker agreed "not to manufacture or sell any of said Robert's Bitters in this county"—not limiting his covenant to the time during which the buyer might carry on the business as provided in the latter section quoted; for this reason it is contended that his contract with Lee was void in this particular. We think it reasonably clear that no design to impose a limit on the time during which defendant was restrained from carrying on the business in Sacramento county is inferable

from the contract; and in that respect it transgressed the statute. But the statute does not render the whole provision void; it avoids it only "to that extent," viz., the extent that it transcends the permissive clause of the statute; within that limit it is valid; this must be regarded as the settled construction of the statute. (*Ragsdale v. Nagle*, 106 Cal. 336, and cases cited.) The judgment here proceeds further, however, and in this regard the respondent concedes that it should be modified.

It is said that defendant has not used the trade name sold by him; that he did not part with the right to make and vend all bitters; and that so long as he did not apply to them such trade name, nor represent his product to be the same as plaintiff's, he did not violate his contract. But the contract purports to transfer "all right, title, and goodwill of the bitters known as Robert's Kidney and Liver Bitters"; this meant the liquid known when compounded as Robert's Bitters; not merely the name by which it was known. It may be that he retained some right to make and sell the same bitters by whatever designation other than "Robert's" he chose to give them (*Spieker v. Lash*, *supra*); but by the terms of the contract he incapacitated himself to exercise this right at all in Sacramento county, and to exercise it anywhere to the impairment of the goodwill he sold to plaintiff (*Snow v. Holmes*, 71 Cal. 142; *Knoedler v. Glaenzer*, 55 Fed. Rep. 898); and it seems to us that representing to plaintiff's customers that the same preparation by a different name was superior to Robert's Bitters tended to draw them from plaintiff, and to injure the goodwill he had bought and paid for.

The court adopted a false rule as to the measure of damages; it proceeded upon the theory that, as in trademark and patent cases, the defendant was compellable to render to plaintiff the net profits of the business of selling Lash's Bitters; trademark cases only are cited to support this branch of the judgment. (*Graham v.*

*Plate*, 40 Cal. 493; *El Modello Cigar Co. v. Gato*, 25 Fla. 886; 23 Am. St. Rep. 537; *Avery v. Mickle*, 85 Ky. 435; 7 Am. St. Rep. 604.) But here, though plaintiff alleged an infringement of his trademark by defendant, the court expressly found against that averment. In cases like the present the damages are rarely susceptible of accurate proof; but the measure, expressed generally, is the value of the business lost to plaintiff—not the gain of defendant, which may be more or less than plaintiff's loss; though such gain may be considered in evidence, it should be shown to correspond in whole or in part with the loss of plaintiff. (*Peltz v. Eichele*, 62 Mo. 171; 180; *Lashus v Chamberlain*, 5 Utah, 140; *Howard v. Taylor*, 90 Ala. 241; *Warfield v. Booth*, 33 Md. 63; 2 Sedgwick on Damages, sec. 632.) Nothing here appearing of the amount of plaintiff's loss, the allowance of damages beyond a nominal sum was error.

The judgment of the superior court should be reversed and the cause remanded for a new trial.

BELCHER, C., and VANCLIEF, C., concurred.

For the reasons given in the foregoing opinion the judgment of the superior court is reversed and the cause is remanded for a new trial.

HARRISON, J., GAROUTTE, J., VAN FLEET, J.

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[Crim. No. 41. Department One.—November 25, 1895.]

THE PEOPLE, RESPONDENT, v. HENRY JAMES ET AL., APPELLANTS.

**CRIMINAL LAW—FORGERY BY INDIANS—ORDER FOR INTOXICATING LIQUOR.**—A forged order for the delivery of intoxicating liquor to bearer is, upon its face, capable of being used to defraud those who may act upon it as genuine, and is within the statute against forgery; and the fact that the defendants accused of the forgery are Indians and that the furnishing of intoxicating liquors to Indians is positively prohibited by law and made a felony, does not prevent the order from being the subject of forgery; and the fact that it was presented and passed by the defendants is a false

factor as to its being the subject of forgery, and the defendants may be properly convicted of the forgery.

Id.—CONTRACT—TEST OF FORGERY.—A writing which is a *nudum pactum* is not the subject of forgery; but the test of the forgery of a contract is whether, upon its face, it may have the effect to defraud those who may act upon it as genuine, or the person in whose name it is forged, and it is immaterial whether or not it covers a subject matter which makes it void as against public policy, or whether or not it possesses the legal requisites of negotiable paper or of an order, or whether or not the person in whose name it purports to be made has the legal capacity to make it, or whether or not the person to whom it is directed is bound to act upon it if genuine, or has a remedy over.

Id.—VARIANCE IN NAME OF PERSON TO BE DEFRAUDED—IDEM SONANS.—Where the forged order is signed Frank "Crushes," and the information alleges that it was forged with intent to defraud one Frank "Crusius," there is no material variance or difference in the names within the doctrine of *idem sonans*; and a demurrer to the information on account of such variance is properly overruled.

APPEAL from a judgment of the Superior Court of Del Norte County and from an order denying a new trial. JAMES E. MURPHY, Judge.

The facts are stated in the opinion of the court.

R. W. Miller, for Appellants.

The order was without legal efficacy, and not the subject of forgery, the consideration being illegal—hence no consideration. (*Eldorado County v. Davison*, 30 Cal. 521; *Carson etc. Co. v. Patterson*, 33 Cal. 334; *Martin v. Wade*, 37 Cal. 168; *Shartzer v. Love*, 40 Cal. 93; *Waterloo etc. Road Co. v. Cole*, 51 Cal. 382; *Abbott v. Rose*, 62 Me. 194; 16 Am. Rep. 427; *Brown v. People*, 86 Ill. 239; 29 Am. Rep. 25.) The name signed to the order was a fictitious name, and should have been so averred in the information, and the information should have further averred that the defendants knew that fact. (*People v. Elliott*, 90 Cal. 586; *People v. Dowd*, 4 Pac. Coast L. J., 459.)

W. F. Fitzgerald, Attorney General, and Charles H. Jackson, Deputy Attorney General, for Respondent.

Upon the principle of *idem sonans*, the variance in the name forged is not material. (*People v. Cummings*,

57 Cal. 88; *People v. Oreileus*, 79 Cal. 180; *People v. Leong Quong*, 60 Cal. 107; *People v. Leong Sing*, 77 Cal. 117; *Wells v. State*, 4 Tex. App. 20; Wharton's Criminal Practice, 9th ed., sec. 119; Wharton's Criminal Evidence, sec. 96; *Commonwealth v. Donovan*, 13 Allen, 571; *People v. Fick*, 89 Cal. 145.) The instrument forged was a proper subject of forgery, and it is immaterial whether it was against public policy or not. (*People v. Munroe*, 100 Cal. 665; 38 Am. St. Rep. 323.)

VAN FLEET, J.—Defendants were convicted of forgery, the charge being that, with intent to defraud Frank Crusius and Gottlob Hess, they forged a false and fraudulent order for the delivery of chattels, in these words: "March 26, '95. Please give to bearer 5 gal. beer, and oblige Frank Crushes"; and passed said order upon Gottlob Hess.

1. The evidence discloses that the defendants are Indians, and it is urged in their behalf that, inasmuch as the sale or furnishing of intoxicating liquor to Indians is positively prohibited by law and made a felony, the order in question was without legal efficacy and void, and, therefore, not the subject of forgery; that, even if genuine, it was not an instrument which the defendants were capable in law of making use of, because the person upon whom it was drawn was not permitted to honor it, and, consequently, that the false making of it could not operate to the injury or defrauding of any one, and for that reason the act did not constitute forgery.

This argument assumes that the supposed infirmity of the forged paper appears upon its face, and, consequently, was bound to be taken notice of by the person upon whom it was drawn. But such is not the fact. The paper is drawn to bearer, and, assuming defendants' position to be true in the instance of a paper disclosing its invalidity upon its face, this paper in the hands of other than an Indian was susceptible of being made the engine of fraud and injury. In this view, the

fact that it was presented and passed by the defendants is wholly immaterial, and may be laid out of consideration as a false factor. If upon its face the paper is capable of being used to defraud those who may act upon it as genuine, it is within the statute. (*People v. Munroe*, 100 Cal. 664; 38 Am. St. Rep. 323; and cases there cited.)

In that case substantially the same objection was made as here, and it is there said by Mr. Justice Garoutte, speaking for the court: "There is no question but that a writing which is a *nudum pactum* is not the subject of forgery; but a contract which a court will not enforce, or even recognize, because it is against the policy of the law, cannot be termed a *nudum pactum*. A forged contract, even though it covers a subject matter which makes it void as against public policy, upon its face may present such an appearance that, if genuine, it might injure another, and such a one satisfies the test which we have laid down."

In *People v. Krummer*, 4 Park. Cr. 217, replying to a like objection, it is said: "We are never called upon to determine whether, in legal construction, the false instrument or writing is an instrument of a particular name or character. It is a matter of perfect indifference whether it possesses or not the legal requisites of a bill of exchange, or an order for the payment of money, or the delivery of property. The question is whether *upon its face* it will have the effect to defraud those who may act upon it as genuine, or the person in whose name it is forged. It is not essential that the person in whose name it purports to be made should have the legal capacity to make it, or that the person to whom it is directed should be bound to act upon it, if genuine, or have a remedy over."

Tested by these principles the contention of defendants cannot be sustained.

2. The objection that the demurrer to the information should have been sustained because it is alleged that the intent was to defraud one Frank "Crusius," and



the forged instrument alleged is signed Frank "Crushes," is without merit. Within the doctrine of *idem sonans* there is no material variance or difference in the names.

The judgment and order denying a new trial are affirmed.

GAROUTTE, J., and HARRISON, J., concurred.

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[Sac. No. 16. Department One.—November 25, 1895.]

K. D. WISE, RESPONDENT, v. L. J. ROSE, JR., APPELLANT.

WAGER—REPUDIATION BEFORE DECISION—RECOVERY FROM STAKEHOLDER.

Where a wager upon the result of a horserace is repudiated, and notice of the repudiation given to the stakeholder before the race is run and the wager decided, the stakeholder is bound to deliver the stake deposited with him by the party repudiating the wager to such party, and he may recover the same from the stakeholder, though subsequently paid over to the winning party.

Id.—PLEADING—INSUFFICIENCY OF DENIAL.—Where the complaint avers that notice of repudiation was given before the race was run, an answer admitting that the notice was given, but stating that the defendant cannot positively say whether it was received prior to the time when the event occurred, or prior to the time when the wager was decided, does not deny the averment of the complaint that he had notice of the repudiation before the race was run, and before it was known, or could have been known, whether plaintiff had won or lost the wager.

Id.—CONJUNCTIVE DENIAL.—A conjunctive denial of several distinct allegations of the complaint, connected by the conjunction "and," is not a denial of any one of them.

Id.—EVIDENCE—REGULATIONS OF TURF.—The regulations and usages of the turf are subject to the laws of the state, and it is not admissible to prove that the words "play or pay," in a written agreement of wager upon a horserace, mean that, after the stakes were placed, neither party could repudiate the wager without the consent of the other, even though one of the horses should die before the day set for the race.

APPEAL from a judgment of the Superior Court of San Joaquin County. JOSEPH H. BUDD, Judge.

The facts are stated in the opinion.

Woods & Levinsky, for Appellant.

The case at bar depends upon "Racing Authorities" and the "Rules of the Turf." (Rules of National Trot-

ting Association, Rules 7, 10, 20, 27; *Gridley v. Dorn*, 57 Cal. 78; 40 Am. Rep. 110.) Where two parties in equal guilt have agreed to gamble, the chancellor ought not to interfere between them and relieve the loser. (*Downs v. Quarles*, Litt. Sel. Cas. 489; 12 Am. Dec. 337.)

*James A. Louttit*, for Respondent.

Wagers upon horseraces are illegal and against public policy. (*Gridley v. Dorn*, 57 Cal. 79; 40 Am. Rep. 110; *Johnston v. Russell*, 37 Cal. 672; *Hill v. Kidd*, 43 Cal. 616; *Love v. Harvey*, 114 Mass. 80.) The rules of the "National Trotting Association" are not authority in any court. (*Gridley v. Dorn*, *supra*.) Plaintiff had a right to repudiate the contract, and demand a return of the money before the wager was decided. (*Johnston v. Russell*, *supra*; *Love v. Harvey*, *supra*; *McKee v. Manice*, 11 Cush. 357; *Morgan v. Beaumont*, 121 Mass. 7; *Fisher v. Hildreth*, 117 Mass. 558; *Hill v. Kidd*, *supra*.)

VANCLIEF, C.—It is alleged in the complaint that plaintiff and A. B. Spreckels laid a wager of \$500 on the result of a horserace to be run on the Stockton course between September 17 and 22, 1894, each depositing with the defendant his stake of \$500, under an agreement that defendant should pay the stakes (\$1,000) to the winner; that before the race was run, and before it was or could have been known or determined whether plaintiff had won or lost the stakes, he repudiated the wager and served written notice of such repudiation upon Spreckels and upon defendant, and, two days thereafter, demanded of defendant his said stake of \$500; but that defendant has failed and refused to return to him said sum of \$500 or any part thereof.

In his answer defendant admits the wager, and that plaintiff and Spreckels each deposited with him a stake of \$500 pursuant to a written agreement between them, which was also deposited with him, of which the following is a copy:

"SAN FRANCISCO, CAL., Aug. 15, 1894.

"In the match race between the mare 'She' and 'Jennie June' the conditions are as follows, to wit: L. J. Rose (Jr.) is stakeholder. The race to be trotted at Stockton, California, during the fall meeting. Each principal to select one judge, they to select a third judge. The principals to agree upon a starter. The race to be three best heats in five and trotted to rule. Positions to be decided by tossing up. The race to be for five hundred dollars a side. Play or pay.

"K. D. WISE.

"A. B. SPRECKELS."

That thereafter the following further written agreement was executed between plaintiff and Spreckels:

"SACRAMENTO, CAL., Sept. 10, 1894.

"The undersigned agree to trot the match race between 'She' and 'Jennie June' on the 18th day of the present month, over the Stockton course.

"A. B. SPRECKELS,

"K. D. WISE."

That at the time and place thus appointed the said "Jennie June" failed to appear, although requested by the judges of the race so to do, but that the mare "She" did appear in accordance with the terms of said agreement, and did trot over said course at said time, and did win said race; and thereupon the judges of said race did so decide and declare in writing, as follows:

"STOCKTON, September 18, 1894.

"In the match race between 'She' and 'Jennie June' the latter did not appear when called, and 'She' came up and was given the word, and after trotting over the course in 2:22 was declared the winner of the race.

"CHRIS. GREEN,

"C. E. NEEDHAM,

"B. F. LANGFORD,

"Judges."

Defendant qualifiedly denied, as hereinafter stated, the alleged repudiation of the wager, and notice thereof

to him and Spreckels, on the ground that he "has no information or belief sufficient to enable him to answer the allegation." But "admits that on the eighteenth day of September, 1894, he received an alleged telegraphic repudiation from said plaintiff, but whether the same was received by him prior to the time when said event occurred, or was to have occurred, or prior to the time when said wager was decided, this defendant cannot positively say."

Further answering the defendant "admits that he has not paid to the said plaintiff the sum of \$500 or any part thereof, but denies that he still has or holds said sum, or any part thereof, and in this behalf alleges that after the happening of the said event, to wit: the winning of the said race by the said mare 'She' that he delivered to, and paid to, said A. B. Spreckels, in accordance with the terms of said written contract or agreement hereinbefore set forth, the full sum of \$1,000."

The plaintiff demurred to the answer on the ground that it does not state facts constituting a defense, and, at the same time and upon the same ground, moved the court for judgment in favor of plaintiff on the pleadings.

The court sustained the demurrer, and also rendered judgment for plaintiff on the pleadings.

Defendant brings this appeal from the judgment on the judgment-roll, with a bill of exceptions showing merely the action of the court on the demurrer and motion for judgment. It does not appear that defendant offered to amend his answer, nor that he expressly declined to amend; but he does not complain that he did not have leave to amend, nor pretend that he desired to amend his answer, but simply contends that his answer stated a defense to the action, and that the court erred in sustaining the demurrer and in rendering judgment in favor of plaintiff.

Unquestionably, the plaintiff was entitled to judgment on the facts stated in his complaint (*Johnston v. Russell*, 37 Cal. 670; *Hill v. Kidd*, 43 Cal. 615; *Girdley v. Dorn*, 57 Cal. 78; 40 Am. Rep. 110); and there is no pretense

that the answer denied any material fact alleged in the complaint, except the averment that plaintiff notified the defendant of his repudiation of the wager *before* the race was run, and before it was known, or could have been known, whether plaintiff had won or lost the wager. The answer shows that the race was trotted by the mare "She" alone, as the second event in the afternoon of September 18, 1894, and expressly admits that defendant received telegraphic notice of plaintiff's repudiation of the wager on that day, and does not deny that he received such notice before the race was trotted by the mare "She," but merely avers that "defendant cannot *positively say*" whether or not the telegram was received by him before the event occurred or before the wager was decided. This is not a denial of the allegation in the complaint that he had notice of the repudiation before the race was run, and before it was known, or could have been known, whether plaintiff won or lost the wager; nor is it an averment that defendant did not *know* that he received the telegram before the race was trotted, and before it was known which party won; and surely it could not have been intended as an averment that he did not *believe* the telegram was received by him before the race was trotted. Nor is this construction of the express admission in defendant's answer affected or qualified by the previous denial (on the ground of want of sufficient knowledge or belief) "that on the 18th day of September, 1894, and prior to the time when the event occurred, or was to have occurred, or prior to the time when said wager was decided, plaintiff repudiated said wager *and* served written notice of said repudiation upon said defendant *and* his representative, one Walter Maben, *also* upon said A. B. Spreckels *and* his representative, one Ben Harris." This copulative denial of four distinct matters, two of which, at least, are immaterial, is not a denial of any one of them. While the repudiation of the wager on September 18th is expressly admitted, the answer is plainly evasive of the material allegation in the complaint that such repudia-

tion and due notice thereof were prior to the occurrence of the event by which alone it could be determined whether plaintiff won or lost the wager.

Appellant offered to prove that the words "play or pay," in the agreement, mean that, after the stakes were placed, neither party could repudiate without consent of the other, even though one of the horses should die before the day set for the race. The court properly refused to hear this evidence, since the regulations and usages of the turf are subject to the laws of the state.

I think the judgment should be affirmed.

SEARLS, C., and BELCHER, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed.

HARRISON, J., GAROUTTE, J., VAN FLEET, J.

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[No. 18272. Department Two.—November 25, 1895.]

JOHN FERNANDEZ ET AL., RESPONDENTS, v. I. C. BURLESON, ETC., ET AL., APPELLANTS.

**MECHANIC'S LIEN—MISDESCRIPTION OF PROPERTY IN CLAIM.**—Where there is no description in the notice of lien sufficient to identify the mining claim upon which the work was actually done with reasonable certainty, to the exclusion of other premises, the notice of lien is insufficient.

**ID.—NOTICE OF LIEN NOT AMENDABLE—PARTICULAR DESCRIPTION CONTROLLING.**—The notice of lien is not an instrument susceptible of reformation, and the monuments and lines by which the property is said in the notice to be particularly described cannot be expunged from the notice, but must be read as part of it, and are of the essence of the description, and must control it.

**APPEAL** from a judgment of the Superior Court of Siskiyou County and from an order denying a new trial. J. S. BEARD, Judge.

The facts are stated in the opinion.

*Warren & Taylor, and T. M. Osmont, for Appellants.*

The description of the claim of lien is insufficient, and cannot be applied to the mine sought to be fore-

closed to the exclusion of other property. (*Willamette etc. Co. v. Kremer*, 94 Cal. 209; *Goodrich Lumber Co. v. Davie*, 13 Mont. 76.)

*James F. Farraher*, for Respondents.

The identifying sufficiency of the notices of liens was a question of fact, which it was the province of the trial court to determine. (*Tredinnick v. Red Cloud Min. Co.*, 72 Cal. 80; *Willamette etc. Co. v. Kremer*, 94 Cal. 209.) The claims of lien are to be viewed in their entirety, and must be liberally construed. (*Tredinnick v. Red Cloud Min. Co.*, *supra*; *White v. Stanton*, 111 Ind. 540; *McNamee v. Rauck*, 128 Ind. 59; Phillips on Mechanics' Liens, 379.)

BRITT, C.—Plaintiffs, eight in number, united in this action under the permissive clause of section 1195 of the Code of Civil Procedure, to enforce liens claimed by them, respectively, for balances due from defendants on account of labor performed by plaintiffs, severally, at the request of defendants, on a mining claim in Siskiyou county. Defendants constitute a mining partnership under the name of Burleson & Parsley; they owned a mining claim called the "Bare Bar" claim, and employed plaintiffs to work thereon; their answer admitted that the balances alleged are due to the plaintiffs, respectively, but denied that the work was done on the premises described in plaintiffs' several claims of lien. There was judgment for the plaintiffs—seven of them—directing the sale of said "Bare Bar" property, and the application of the proceeds to the payment of the demands of the successful plaintiffs, with costs and attorneys' fees; the correctness of the judgment depends upon the answer to the question whether the property thus directed to be sold is described at all in the claims of lien filed in the office of the county recorder under section 1187 of the Code of Civil Procedure. In this particular the notices were all in the same form; that of Fernandez, taken as an example,

stated: "I . . . . give notice of my intention to hold and claim a lien . . . . upon that certain mining claim situated in the Virginia Bar mining district, county of Siskiyou, state of California, particularly described as follows [giving a specific description by monuments, metes, and bounds], containing twelve acres, more or less, . . . . with all improvements, including wheels, pumps, and all mining facilities and appurtenances situated thereon. The said lien being claimed and held for . . . . work done . . . . upon said premises . . . . from the 27th day of June, 1892, to the 8th day of September, 1892, . . . . at the special instance and request of Burleson & Parsley, the owners and reputed owners thereof."

It is conceded that the description by monuments, metes, and bounds, thus stated, does not apply in any part to the "Bare Bar" property, where plaintiffs did their work, but does apply with entire accuracy to an adjoining mining claim known as the "Otto Bar," in which defendants had, with other persons, some interest, but which was not worked at all during the year 1892. It was in evidence, however, that there were no wheels, pumps, or mining facilities on the "Otto Bar" mining claim, while there were such on the "Bare Bar" claim; that mines in the vicinity were "generally known by the names of the parties running them"; that the "Bare Bar" claim was commonly called the Burleson & Parsley claim; that mining claims were somewhat numerous in that neighborhood, but defendants worked no other.

The court found that the claims of lien as filed contained a description of the property intended to be charged sufficient for identification, and that any one familiar with the locality can readily identify the "Bare Bar" mine as the mining claim which plaintiffs intended to charge with their liens. We discover no evidence to justify this finding.

The contention of respondents' counsel, as we understand it, is that the boundaries given in the claim of



lien may be disregarded, and that the other circumstances stated, viz., that the lien is claimed upon mining ground, in a specified mining district, with all improvements, including wheels, pumps, etc., situated thereon, for work done by the claimant between specified dates, at the request of Burleson & Parsley, the owners and reputed owners thereof, will "enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty, to the exclusion of others," and hence is sufficient. (*Willamette etc. Co. v. Kremer*, 94 Cal. 209.) But, in the first place, there is no warrant in the law, or in the abstract equity of the case, for rejecting the boundaries by which the notice of lien states that the property is "particularly described." One of the most important requirements of the statute governing the creation of such liens is that the notice shall contain a description of the property to be charged sufficient for identification. (Code Civ. Proc., sec. 1187.) Without such description the notice would in some instances be of no value to the owner, and could rarely be of any use to creditors, purchasers, or other lien claimants dealing with the land. (Phillips on Mechanics' Liens, sec. 378.) If this were a case of mistake as to some incident of the description, the mistaken circumstance, like a false call in a deed, would be rejected (*Willamette etc. Co. v. Kremer, supra*); but, on the contrary, the error is of the essence of the description. To reject the particular description and rely on the adventitious circumstances which accompany it would be to invert the maxim that the incident follows the principal, and not the principal the incident (Civ. Code, sec. 3540); the notice of lien is not an instrument susceptible of reformation (*Goss v. Strelitz*, 54 Cal. 640); therefore, the monuments and lines by which the property is said in the notice to be "particularly described" cannot be expunged from the notice, but must be read as part of it; so read it is misleading in a particular where it should be substantially true. (*Wagner v. Hansen*, 103 Cal. 107.) Secondly, were the

particular description omitted and the other circumstances stated in the notice alone consulted, we do not think that a person familiar with the locality merely could thereby identify the premises with reasonable certainty to the exclusion of others; he would also need to know that the claimant worked on the premises, and when he worked there—knowledge of which matters cannot be implied from mere knowledge of the locality. Besides, the statute requires that the notice itself must describe the property on which the work was done. (Code Civ. Proc., secs. 1183, 1187.) A notice that the property to be charged is the property where claimant worked does not take the first step toward compliance with the statute. Nothing then remains except the reference to pumps, wheels, and mining facilities, and to the names of the owners; it is shown affirmatively that the defendants claimed and were reputed to own an interest in the "Otto Bar" mine; and the reference to the wheels, pumps, etc., is—on our present assumption—to them as situate upon unascertained land. On these facts, at the very most, one might suspect that the "Bare Bar" mine was intended, but that he could identify it with reasonable certainty to the exclusion of other premises is incredible.

The judgment and order should be reversed.

HAYNES, C., and BELCHER, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are reversed.

TEMPLE, J., HENSHAW, J., MCFARLAND, J.

[No. 19410. In Bank.—November 25, 1895.]

**HENRY DAGGETT, RESPONDENT, v. WILL GRAY  
ET AL., APPELLANTS.**

**CONVERSION OF GOODS—PLEADING—DEMAND AND REFUSAL.**—A complaint alleging that the plaintiff was the owner and lawfully entitled to the immediate possession of a stock of goods at a date specified, upon which date defendants, then being in possession of said goods, unlawfully converted and disposed of the same to their own use, whereby plaintiff sustained damages in a specified sum, sufficiently states a cause of action as against a general demurrer, and is not defective by reason of a failure to allege that the plaintiff had made a demand upon defendants for the property, and that there was a refusal on their part to comply with such demand.

**ID.—EVIDENCE OF CONVERSION.**—A demand and refusal do not of themselves constitute conversion, but are only evidence from which conversion in certain cases may be found; and a conversion may be established by proof of other acts on the part of a defendant concerning the property, and if the relation of the defendant to the property is such that a previous demand is essential in order to establish conversion, such demand must be proved at the trial, but need not be alleged.

**ID.—GENERAL ALLEGATION OF CONVERSION.**—Where conversion is alleged as a fact in general terms, it is sufficient to admit of any evidence on the trial that tends to establish such conversion, and the plaintiff is not bound to allege the particular act or acts which constitute the conversion.

**ID.—WAIVER OF GROUNDS OF SPECIAL DEMURRER.**—Objections to a complaint which are grounds of special demurrer are waived where the demurrer is general and no special grounds are specified therein.

**ID.—AID OF COMPLAINT BY ANSWER.**—An omitted allegation in the complaint may be aided by an averment of that fact in the answer, so as to uphold a judgment thereon, even though a demurrer to the complaint for the want of the fact had been erroneously overruled.

**ID.—ALLEGATION OF DEMAND—WAIVER OF OMISSION.**—A claim by a bailee in his answer of the ownership of goods intrusted to his keeping, and a denial of any title in his bailor, obviates the necessity of proving a demand for the goods before bringing suit, and waives the omission of an allegation of such demand.

**APPEAL** from a judgment of the Superior Court of the County of San Diego and from an order denying a new trial. E. S. TORRENCE, Judge.

The facts are stated in the opinion.

*Parrish & Mossholder and Walter Rose, for Appellants.*

An allegation of demand is necessary before commencement of suit where the property has come law-

fully into the possession of the defendant. (*Paige v. O'Neal*, 12 Cal. 496; *Campbell v. Jones*, 38 Cal. 507; *Harpending v. Meyer*, 55 Cal. 560; *Boulware v. Craddock*, 30 Cal. 191.

*Johnstone Jones*, and *David L. Withington*, for Respondent.

There was no necessity of alleging a demand, and it was sufficient to allege a conversion. (*Dodge v. Meyer*, 61 Cal. 420; *People v. Van Ness*, 79 Cal. 88; 12 Am. St. Rep. 134; *Denney v. Superior Court*, 84 Cal. 11; *Lehmann v. Schmidt*, 87 Cal. 21; *Davidson v. Donadi*, 2 E. D. Smith, 122; 5 Am. & Eng. Ency. of Law, 578, note; *Pease v. Smith*, 61 N. Y. 477; *Dunnahoe v. Williams*, 24 Ark. 264; *Dudley v. Sawyer*, 41 N. H. 326; 4 Am. & Eng. Ency. of Law, 115; *Himes v. McKinney*, 3 Mo. 382; *Riford v. Montgomery*, 7 Vt. 411.) The answer cures any defect in the complaint. (*Woodworth v. Knowlton*, 22 Cal. 169; *Richardson v. Smith*, 29 Cal. 529; *Feely v. Shirley*, 43 Cal. 369; *Burns v. Cushing*, 96 Cal. 669; *Cohen v. Knox*, 90 Cal. 266, 276.)

HARRISON, J.—This action was brought to recover damages from the defendants for the conversion by them of a stock of drugs in the Hotel Brewster Building, in San Diego. The defendants demurred to the complaint upon the ground that it did not state a cause of action, and, upon the overruling of their demurrer, answered the complaint. The cause was tried by the court and judgment rendered in favor of the plaintiff, from which and an order denying a new trial the defendants have appealed.

1. The demurrer was properly overruled. The complaint alleges that the plaintiff had been appointed receiver in an action then pending in the superior court of the county of San Diego, in which one Brickey was the defendant, and that as such receiver he was on the seventeenth day of March, 1893, "the owner and lawfully entitled to the immediate possession of a stock of goods

in the drugstore in the Hotel Brewster Building, in San Diego, in said county," and that on said seventeenth day of March, 1893, "the defendants, then being in possession of said goods, unlawfully converted and disposed of the same to their own use," whereby he had sustained damage. The defendants urge that this complaint is defective by reason of a failure to allege that the plaintiff had made a demand upon them for the property, and a refusal on their part to comply with such demand. As demand and refusal does not of itself constitute conversion (*Steele v. Marsicano*, 102 Cal. 666), but is only evidence from which conversion in certain cases may be found, so conversion may be established by proof of other acts on the part of a defendant concerning the property. If the relation of the defendant to the property is such that a previous demand is essential in order to establish conversion on his part, proof of such demand must be made at the trial, but the demand need not be alleged. The allegation that the defendants "converted and disposed of the property to their own use" is the allegation of a fact sufficient, in the absence of a special demurrer, to sustain a judgment. Upon the trial of an issue on this averment the plaintiff would be at liberty to introduce evidence of a demand and refusal, if such evidence were sufficient or necessary to establish the conversion, and he would also, under this averment, be authorized to offer evidence that the defendants had sold or otherwise dealt with the property in repudiation of the claim of the plaintiff. "Where conversion is alleged as a fact in general terms, that is sufficient to admit of any evidence on the trial of issue joined that tends to establish such conversion; and the plaintiff is not bound to allege the particular act or acts which constitute conversion in an action of this character. Averments which sufficiently point out the nature of the pleader's claim are sufficient, if under them upon a trial of the issues he would be entitled to give all the necessary evidence to establish the claim."

(*Berney v. Drexel*, 33 Hun, 34. See, also, *Johnson v. Ashland Lumber Co.*, 45 Wis. 119; *Rochester Ry. Co. v. Robinson*, 133 N. Y. 246.)

The other objections to the complaint urged in the brief on behalf of the appellants would be relevant if there had been a demurrer on the ground of uncertainty or ambiguity, but as these grounds were not specified in the demurrer they were waived, and cannot now be considered.

2. Whatever defect there may have been in the complaint in this particular was removed by the answer of the defendants, wherein they alleged their ownership of the goods, and denied that the plaintiff had had "at any time since the twelfth day of March, 1893, any interest in, or been entitled to the possession of," the property sued for. The rule is well settled that a complaint which lacks the averment of a fact essential to a cause of action may be so aided by the averment of that fact in the answer as to uphold a judgment thereon (*Pomeroy on Remedies and Remedial Rights*, sec. 579; *Schenck v. Hartford etc. Ins. Co.*, 71 Cal. 28), even though a demurrer to the complaint for the want of this fact had been erroneously overruled. (*Cohen v. Knox*, 90 Cal. 266.) The rule in those cases which hold that when the defendant came lawfully into the possession of the property a demand and refusal must be established in order to charge him with conversion, and must be alleged in the complaint in order to permit of such proof, ceases when the defendant admits in his answer that he has converted the goods to his own use, or alleges facts showing that a previous demand would have been futile. The denial in the answer of a tenant of his tenancy, and of the title of his landlord, obviates the necessity of proving or alleging a notice to quit. (*Smith v. Shaw*, 16 Cal. 88; *Simpson v. Applegate*, 75 Cal. 342.) Upon the same principle the claim by a bailee in his answer of the ownership of goods intrusted to his keeping, and a denial of any title in his bailor, obviates the necessity

of proving a demand for the goods before bringing suit, and waives the omission of an allegation of such demand.

The judgment and order are affirmed.

**GAROUTTE, J., VAN FLEET, J., MCFARLAND, J., BEATTY, C. J., TEMPLE, J., and HENSHAW, J., concurred.**

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[No. 15871. Department Two.—November 26, 1895.]

**EUGENIA BEATRICE BROOKS, A MINOR, BY MINNIE BROOKS, HER GUARDIAN AD LITEM, APPELLANT AND RESPONDENT, v. SAN FRANCISCO AND NORTH PACIFIC RAILWAY COMPANY, RESPONDENT AND APPELLANT.**

**APPEAL—JUDGMENT—REVIEW OF EVIDENCE.**—Under section 939 of the Code of Civil Procedure the sufficiency of the evidence to support the judgment cannot be considered on an appeal therefrom, unless the appeal is taken within sixty days after the rendition thereof.

**ID.—NEW TRIAL—CONDITIONAL ORDER GRANTING.**—An order granting a new trial on account of the insufficiency of the evidence to justify the verdict is within the discretion of the trial court, and that court may make its order conditional upon the payment to the opposite party of a sum of money for counsel fees and expenses. Such an order will not be disturbed on appeal unless it manifestly appears that there has been an abuse of discretion.

**APPEALS from a judgment of the Superior Court of the City and County of San Francisco and from an order granting a new trial. A. A. SANDERSON, Judge.**

The facts are stated in the opinion.

*Clement, Cannon, Kline & Stradley, for Plaintiff.*

*Sidney V. Smith, for Defendant.*

**SEARLS, C.**—This was an action to recover damages sustained by the infant plaintiff for personal injuries received while a passenger upon the railway train of the corporation defendant.

The cause was tried before a jury and a verdict rendered in favor of plaintiff for five thousand dollars. Judgment was entered thereon February 26, 1894.

Defendant in due time moved for a new trial, which was granted "upon the payment by defendant to plaintiff of the sum of three hundred dollars for counsel fees and expenses necessarily incurred in said motion." This order was made June 25, 1894.

On July 23, 1894, defendant gave notice of an appeal to this court from the order of the court below granting the new trial upon the condition specified in the order, and, on the same day, gave notice of an appeal from the final judgment entered in the cause February 26, 1894.

On June 25, 1894, plaintiff gave notice of an appeal to this court from the order of the court below granting the new trial. These appeals were all duly perfected, and are all based upon a single transcript.

The foregoing dates as to the entry of judgment and appeal therefrom are given for the purpose of showing that defendant's appeal from the final judgment was not taken within sixty days after the rendition thereof, and hence, that under section 939 of the Code of Civil Procedure the sufficiency of the evidence to support such judgment cannot be reviewed on such separate appeal, and as upon the judgment-roll the judgment seems regular, we may dismiss from consideration the separate appeal therefrom, and turn our attention to the two appeals from the order granting a new trial.

The contention of the plaintiff is that to grant a new trial at all was error, and an abuse of the discretion lodged in the court, while the defendant bases its appeal upon the ground that it was clearly entitled upon the record to a new trial, and, therefore, that the condition imposed by the court below was erroneous.

1. As to the appeal by defendant.

That a *nisi prius* court has the power to impose terms as a condition of making an order for a new trial is too well settled to need argument in its support.

In *Rice v. Gashirie*, 13 Cal. 54, which in view of the



fact that the motion was founded upon errors of law occurring at the trial, and hence at first blush would seem not to have been a case involving turpitude on the part of the losing party, the court below granted a new trial upon condition that the moving party should pay the costs.

Upon an appeal by the moving party this court, speaking through Baldwin, J., said: "The terms upon which a court will grant a new trial are peculiarly a matter within its discretion. This must necessarily be so, for so many reasons relating to the conduct, management, and peculiar circumstances of the trial may exist that it would be impossible to prescribe any general rules on the subject. If error at law intervenes, a party may take his exceptions and prosecute his appeal without motion for a new trial; but if he makes his motion and relies upon that for redress against an improper verdict, he must subject himself to the equitable power of the court.

"The verdict may have gone against him in some degree or wholly, by his own neglect or default, or even the rulings of law be chargeable to his own laches or want of diligence. In such cases it may be proper to grant him a new trial, yet only upon equitable terms. We cannot interfere with this exercise of discretion unless upon a clear showing that it has been abused, or that the terms were grossly unreasonable."

In the present case the motion for a new trial was based, among others, upon the ground of the "insufficiency of the evidence to justify the verdict."

This is a ground appealing peculiarly to the discretion of the trial court. And wherever the conditions are such that the court below is authorized in its discretion to impose terms as a condition to granting a new trial, this court will interfere only in those cases where it manifestly appears that there has been an abuse of such discretion.

The following cases in this court recognize and uphold the right of the trial court in one form and another

to impose terms and conditions in granting and refusing motions for new trials; *Sherman v. Mitchell*, 46 Cal. 578; *Gillespie v. Jones*, 47 Cal. 264; *Chapin v. Bourne*, 8 Cal. 294; *Harrison v. Peabody*, 34 Cal. 178; *Dreyfous v. Adams*, 48 Cal. 131; *Benedict v. Cozzens*, 4 Cal. 381; *Cor-dor v. Morse*, 57 Cal. 301; *Gregg v. San Francisco etc. R. R. Co.*, 59 Cal. 312; *Davis v. Southern Pac. Co.*, 98 Cal. 13.

In the case last cited the jury had found a verdict in favor of plaintiff for fifteen thousand three hundred dollars. Defendant moved for a new trial.

The trial court made an order that, if plaintiff should consent that the judgment be reduced to nine thousand dollars, the new trial would be denied, and that otherwise it would be granted. Plaintiff consented to the reduction, and the motion was thereupon denied. Defendant appealed from the order.

Counsel for appellant attacked the power of the court to make such an order, and contended that if the court thought the verdict excessive its duty was to grant a new trial.

This court, speaking through McFarland, J., after admitting that the position of appellant was a strong one, added: "But whatever might be considered the weight of reason and foreign authority on the question above stated, if it were *res integra* here, the right of a court to do what is complained of in the case at bar is too firmly established in this state by a long line of decisions to be now questioned."

The principle involved in that case is the same as that underlying the present one, and goes to the power of the court to impose terms in granting and refusing motions for new trials.

A review of the record fails to disclose any basis for concluding that there was an abuse of discretion in imposing terms as a condition to granting the motion for a new trial. It follows that the order appealed from by defendant should be upheld.

2. As to the appeal of plaintiff from the order granting such new trial.

The infant plaintiff, a young girl of the age of twelve and one-half years, a passenger on the 5 P. M. train of the defendant from Tiburon to San Rafael, on Sunday, July 6, 1890, seated in next to the rear car, and designing to stop at San Rafael, remained on board the train when it stopped at the regular station in said last-named city, supposing her car would be detached from the train a couple of blocks beyond said station, and that she could then and there leave the car at a point nearer her temporary home.

The train did not stop or detach cars as plaintiff had anticipated, but moved on up a grade of one hundred feet per mile at a rate of speed of eight to ten miles per hour, when the plaintiff, being alarmed at being carried beyond her home, started for the rear car, as she stated, to find the conductor, and upon reaching the platform fell from the car, as she says, whereby her right foot and ankle were crushed by the wheels of the car, rendering amputation of the leg necessary.

The theory of the plaintiff was that defendant was accustomed to drop off cars from the rear of its trains at a point two or three blocks north of the San Rafael station, and switch them to a sidetrack; that passengers residing in the vicinity of such switch and sidetrack were and for some years had been accustomed, with the knowledge of the defendant, to remain on such cars until they were detached from the train, and that this custom had been so uniform and general that plaintiff was entitled to rely, and did rely, upon its observance, and that the failure of the defendant to stop its train on the day in question, and at the point indicated in conformity to such custom, was such negligence as rendered defendant liable for the consequences to the plaintiff. Plaintiff introduced some evidence tending to establish such custom.

Defendant took issue with plaintiff as to the existence of the habit or custom indicated above, and introduced evidence tending to prove that under its summer schedule or arrangement in 1890 it ran trains on week days,

leaving San Francisco by boat for Tiburon, where connection was made with the cars as follows: At 3:30 P. M., at 5 P. M., and at 6:15 P. M.

The 3:30 train ran through to Cloverdale; the 5 P. M. through train ran to Santa Rosa. To accommodate the local travel to San Rafael, a local train also ran to that point on the 5 P. M. schedule, pulling out of Tiburon five minutes in advance of the Santa Rosa train, and on reaching San Rafael it discharged its passengers, ran up the track to a point above the switch (near the point where the plaintiff expected to alight), and was backed upon a siding to permit the through train to pass. This through train dropped no cars at San Rafael on week days.

The 3:30 train on week days did, ordinarily, drop off two cars above the switch, and they found their way back by gravity, and were shunted upon the sidetrack.

Upon this local train and upon the 3:30 train it is apparent, from the testimony, passengers did remain on board at times, at least, and land at or near the switch, which is north of and beyond the station.

On Sunday, in 1890, there was no considerable number of passengers for San Rafael at 5 P. M., and the local train was not run, but the Santa Rosa train carried all the passengers, stopped at the station in San Rafael, but did not stop at the switch or drop off any cars, as they were all needed to bring down passengers from above on Monday morning, who were accustomed to go up Saturday evening to spend Sunday in the country.

This is but an outline of the testimony. We shall not comment upon it, for the reason that it is not desirable to express any opinion upon the facts of a case which must be again tried beyond what is absolutely necessary.

It is sufficient to say that the court below was warranted in granting a new trial. It was said in *Cole v. Wilcox*, 99 Cal. 549, by Harrison, J.: "The action of the trial court in granting a new trial for the reason that the former verdict or decision was not supported by the

evidence is so much a matter of discretion that, unless it appears that there was an abuse of that discretion, this court will not interfere with its action."

There is no abuse of discretion apparent in the present case.

The order appealed from by the plaintiff and the order appealed from by the defendant, and each of them, should be affirmed, and as, upon such affirmance, the judgment appealed from will, upon the compliance of defendant with the condition upon which the motion for a new trial was granted, cease to exist, the appeal from the judgment should be dismissed, each party to pay her and its own costs on appeal.

VANCLIEF, C., and BELCHER, C., concurred.

For the reasons given in the foregoing opinion the order appealed from by the plaintiff and the order appealed from by the defendant, and each of them, is affirmed, and as, upon such affirmance, the judgment appealed from will, upon the compliance of defendant with the condition upon which the motion for a new trial was granted, cease to exist, the appeal from the judgment is dismissed, each party to pay her and its own costs on appeal.

McFARLAND, J., HENSHAW, J., TEMPLE, J.

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[Sac. No. 8. Department Two.—November 26, 1895.]

OTTO GRUNSKY, ASSIGNEE, ETC., APPELLANT, v.  
A. PARLIN, RESPONDENT.

**INSOLVENCY—TRANSFER OUT OF USUAL COURSE OF BUSINESS—PRESUMPTION OF FRAUD—REBUTTAL—CONFLICTING EVIDENCE.**—In an action by an assignee in insolvency to recover merchandise transferred by the insolvent to the defendant, the fact that the transfers were not made in the ordinary course of business of the insolvent renders them *prima facie* fraudulent; but the presumption of fraud is subject to rebuttal, and where there was evidence on behalf of the defendant which tended to show that he had no information of the insolvent condition of the grantor, and that the prices paid and agreed to be paid were the full and fair value of the property purchased, and that he has offered to make deferred payments to the assignee, such evidence, if believed, is suffi-

cient to rebut the presumption of fraud; and where the evidence is conflicting, the credence to be allowed to the evidence for the defendant is for the trial court to determine, and a decision by the trial court that the defendant made his purchases in good faith and without fraudulent intent, and for a sufficient consideration, will not be disturbed upon appeal.

**ID.—FRAUDULENT INTENT OF VENDOR—OMISSION TO FIND.**—Where the findings exonerate the vendee of the charge of fraud, the intent of the vendor becomes immaterial, and an omission to find as to whether the insolvent was guilty of a fraudulent intent in the transfer to the vendee is not an omission to dispose of a material issue.

**ID.—FRAUD OF SELLER—INNOCENT PURCHASER.**—A transfer by an insolvent debtor cannot be vacated because of the fraud of the seller in which the purchaser had no part, and of which he had no notice.

**APPEAL** from a judgment of the Superior Court of the County of San Joaquin and from an order denying a new trial. **ANSEL SMITH**, Judge.

The facts are stated in the opinion.

*Minor & Ashley*, and *James H. & J. E. Budd*, for Appellant.

The transfer was fraudulent, being out of the usual course of business. (*Washburn v. Huntington*, 78 Cal. 576.) The court having found that the sales were made out of the usual and ordinary course of business, such finding imports notice of insolvency to the purchaser, and the court erred in failing to find as to whether the transfer was made by the insolvent in contemplation of insolvency to prevent his property from coming to his assignee in insolvency. (Wait on *Fraudulent Conveyances*, sec. 376; *Ohleyer v. Bunce*, 65 Cal. 544; *Washburn v. Huntington*, *supra*; *Godfrey v. Miller*, 80 Cal. 425.) The fact that the defendant paid a valuable consideration is immaterial, as the law requires good faith as well as a valuable consideration. (*Blennerhassett v. Sherman*, 105 U. S. 100; *Kerr on Fraud*, sec. 200; Wait on *Fraudulent Conveyances*, sec. 207.)

*Nicol & Orr*, for Respondent.

The mere fraudulent intent of the insolvent alone, not participated in by the purchaser, cannot defeat the

conveyance, and the fact that shortly after the sale the vendor was adjudged an insolvent does not affect the purchaser's rights. (*Merchants' Nat. Bank v. Northrup*, 22 N. J. Eq. 58; *Cohen v. Knox*, 90 Cal. 273; *Priest v. Brown*, 100 Cal. 629.)

**BRITT, C.**—Hull was a dealer in stationery and musical instruments. His voluntary petition in insolvency was filed June 16, 1893, and in due course plaintiff was chosen his assignee. At sundry times within three days next before said June 16th, Hull sold to defendant certain pianos and organs, and notes and other contracts previously taken by him in the course of business with his customers; the amount of the sales to defendant was thirteen hundred and eighty-five dollars, of which six hundred and fifty-six dollars was paid in cash, and by agreement the sum of seven hundred and twenty-nine dollars was to be subsequently paid in installments. Plaintiff brought this action to set aside such sales, alleging that the same were made to prevent the coming of the property to the possession of the assignee, and its ratable distribution among Hull's creditors, and to defeat the objects of the Insolvent Act of 1880. The trial was by the court, which found that the defendant made his purchases in good faith, without the intent charged and for sufficient consideration; defendant had judgment accordingly. Appellant urges that the findings are unsupported by the evidence.

The transfers in question were not made in the ordinary course of the business of Hull, and hence were *prima facie* fraudulent (Insolvent Act, sec. 55); there was also evidence of other circumstances tending to cast suspicion on them. But on behalf of defendant there was evidence which tended to show that he had no information of Hull's insolvent condition; that the prices paid and agreed to be paid were the full and fair value of the property he purchased; that he has offered to make to the assignee the payments deferred under his arrangements with Hull; and that his conduct,

speaking generally, was not inspired by any fraudulent motive. The presumption of fraud was subject to rebuttal (*Bernheim v. Christal*, 76 Cal. 567); and, though the evidence in some parts was sharply conflicting, yet there was sufficient, if believed, to rebut such presumption; what credence should be allowed to it was a matter for the trial court to determine. These remarks apply as well to the choses in action assigned to defendant as to the pianos and organs, though appellant argues that the facts were so different regarding the former that as to them, at least, he should have had judgment.

It is also contended that in failing to find whether Hull entertained the fraudulent intent alleged in the complaint the court omitted to dispose of a material issue. But, since the findings exonerated the vendee of the charge of fraud, the intent of the vendor ceased to be of any consequence in the case; a transaction of this nature cannot be vacated because of the fraud of the seller in which the purchaser had no part, and of which he had no notice. (*Merchants' Nat. Bank v. Northrup*, 22 N. J. Eq. 58.)

The judgment and order appealed from should be affirmed.

BELCHER, C., and SEARLS, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

McFARLAND, J., HENSHAW, J., TEMPLE, J.

Hearing in Bank denied.



[No. 15304. Department One.—November 27, 1895.]

**ROBERT B. KNOWLTON, PLAINTIFF, v. JOHN MACKENZIE AND C. H. KAUFMAN, DEFENDANTS. C. H. KAUFMAN, APPELLANT, GEORGE O. DAVIS, INTERVENOR, RESPONDENT.**

**JUDGMENT AGAINST ASSIGNEE OF INSOLVENT—PAYMENT TO ASSIGNOR OF CLAIMANT—FINDING OF FACT AMONG CONCLUSIONS OF LAW—CONCLUSIVENESS UPON APPEAL.**—Where judgment was rendered against an assignee for the benefit of creditors of an insolvent stockbroker, in favor of an intervening creditor, for the difference between the amount realized by the assignee from the sale of stocks belonging to the intervenor's assignor, and a sum of money deducted therefrom on account of moneys received by such assignor, the finding that such sum was to be deducted from such amount is a finding of fact, although placed after the conclusions of law; and, in the absence of the evidence presented thereon in a statement or bill of exceptions, such finding of fact is conclusive upon appeal.

**ID.—UNAUTHORIZED MODIFICATION OF JUDGMENT.**—After the court has rendered judgment in accordance with its findings, neither the findings nor the judgment can be changed except through a motion for a new trial, or upon appeal, and the court loses all power to change its findings of fact after the entry of judgment, in the absence of a motion for a new trial, and has no power, in the absence of such motion, to modify the judgment drawn from the findings of fact as made.

**ID.—STIPULATION FOR MODIFICATION OF JUDGMENT—STATEMENT OF ATTORNEY.**—Where some of the parties to the action stipulated for a modification of the judgment, but the attorney for the appellant expressly refused to sign any stipulation, and merely verbally expressed the willingness of his client to obey the order of the court, such statement is not the equivalent of a stipulation, and does not prevent his client from objecting upon appeal to the want of authority in the court to modify the judgment.

**ID.—AUTHORITY OF ATTORNEY TO BIND CLIENT—PRESUMPTION—KNOWLEDGE OF CLIENT'S INSTRUCTIONS.**—Although, as a general rule, a stipulation of an attorney will be presumed to have been authorized by the client, yet, when the adverse party, as well as the court, is aware that the attorney is acting in direct opposition to his client's instructions or wishes, the reason of the rule ceases, and the court ought not to act upon the stipulation, nor can the adverse party claim the right to enforce a judgment rendered by reason thereof.

**ID.—CONSENT TO MODIFICATION OF JUDGMENT—AUTHORITY OF ATTORNEY.** For the purpose of prosecuting and defending an action the authority of an attorney ordinarily terminates with the entry of judgment except for the purpose of enforcing it, or seeking to have it set aside or reversed; and, when the judgment has once been entered under the direction of the court, the rights of the client have been determined, and the attorney ceases to have any authority to consent to its modification, to the prejudice of the client, without his consent.

**APPEAL—DISMISSAL—PROOF OF SERVICE OF LOST NOTICE—SUPPLY OF RECORD.**—Where a motion is made to dismiss an appeal upon the ground that the transcript fails to show that the notice of appeal was served upon the respondent, the appellant in reply thereto may file as a portion of the record a certified copy of proceedings in the superior court, showing that the original notice of appeal has been lost, and that it has been established to the satisfaction of that court that the notice of appeal set forth in the printed transcript was duly served, and a written admission of the service made by the attorney for the respondent indorsed upon the same, and that said notice of appeal was filed in the office of the clerk of that court; and that the court thereupon made an order directing that a copy of the notice of appeal, together with the affidavit showing its original filing and service, be filed *nunc pro tunc*; and the substituted papers made upon such order of the court are entitled to the same weight as the originals.

**APPEAL from a judgment of the Superior Court of the City and County of San Francisco. T. H. REARDON, Judge.**

The facts are stated in the opinion of the court.

*Garber, Boalt & Bishop*, for Appellant.

The modified judgment is in excess of the findings, and cannot be maintained upon appeal. (*North Pac. R. R. Co. v. Reynolds*, 50 Cal. 91, 93; *Bosquett v. Crane*, 51 Cal. 505; *Dowd v. Clarke*, 51 Cal. 262; *Knight v. Roche*, 56 Cal. 15, 25; *Evans v. Jacobs*, 59 Cal. 628; *West Coast etc. Co. v. Newkirk*, 80 Cal. 275, 280.) The modification of the judgment was not made by consent of appellant, and his attorney had no authority to consent thereto, or to compromise or surrender his rights. (*Pfister v. Wade*, 69 Cal. 133, 140; *Preston v. Hill*, 50 Cal. 43; 19 Am. Rep. 647; *Edwards v. Edwards*, 29 La. Ann. 597; *Wadhams v. Gay*, 73 Ill. 415; *Fitch v. Scott*, 3 How. (Miss.) 314; 34 Am. Dec. 86, 93, et seq., note; *Lockhart v. Wyatt*, 10 Ala. 231; 44 Am. Dec. 481; *Doe ex dem. Reynolds v. Ingersoll*, 11 Smedes & M. 249; 49 Am. Dec. 57.)

*James G. Maguire, Frank Shay, and George W. Towle*, for Respondent.

The record shows that the judgment was by consent, and the appeal should be dismissed. (*San Francisco v.*

*Certain Real Estate*, 42 Cal. 513, 518; *Sleeper v. Kelly*, 22 Cal. 456; *Coryell v. Cain*, 16 Cal. 567, 572; *Brotherton v. Hart*, 11 Cal. 405; *Imley v. Beard*, 6 Cal. 666; *Mecham v. McKay*, 37 Cal. 154, 158; *McCreery v. Fuller*, 63 Cal. 30; *Partridge v. Shepard*, 71 Cal. 470, 475.) The assignee, being a trustee for the benefit of creditors, is not a party aggrieved. (Code Civ. Proc., sec. 938; *Goldtree v. Thompson*, 83 Cal. 420, 422; *Roach v. Coffey*, 73 Cal. 281, 282; *Estate of Marrey*, 65 Cal. 287; *Bates v. Ryberg*, 40 Cal. 463, 465; *Estate of Wright*, 49 Cal. 550; *Rosenberg v. Frank*, 58 Cal. 387, 420; *In re Dewar's Estate*, 10 Mont. 422; *Estate of Jessup*, 80 Cal. 625.)

HARRISON, J.—The defendant Mackenzie was engaged as a stockbroker in San Francisco, and on the 3d of December, 1886, made an assignment for the benefit of his creditors to C. H. Kaufman, the appellant herein, under the provisions of title III, part II, division IV, of the Civil Code, and on the same day transferred to him certain money and other personal property. Included in the property so transferred were certain mining stocks belonging to M. H. McDonald, which were subsequently sold by Kaufman under directions from one Scott, to whom McDonald had transferred her claim against Mackenzie, and for which Kaufman realized the sum of \$5,316.55. The court found that the sum of \$1,494.08, which had been received by McDonald from Kaufman, should be considered as a payment upon this claim, and found, as a conclusion of law, "that the intervenor, George O. Davis, is entitled to a judgment against the defendant C. H. Kaufman, assignee of John Mackenzie, in the sum of \$3,822.52." Davis was the successor in interest through Scott to the claim of McDonald, and had filed a complaint in intervention in the action. These findings of the court were filed January 21, 1889, and judgment thereon was signed and filed on the same day, and entered of record January 31, 1889, by which it was adjudged "that the intervenor, George O. Davis, do have and recover of and from the defendant C. H.

Kaufman the sum of \$3,822.52." May 24, 1889, the court made an order, which was entered in its minutes, that the judgment be modified "by striking out therefrom \$3,822.52, and substituting in lieu thereof \$5,769.52, so that the said George O. Davis shall have and recover of and from the said C. H. Kaufman the sum of \$5,769.52 instead of the sum of \$3,822.52," and that said modification be made *nunc pro tunc* of the 31st of January, 1889, and that the clerk of the court make an entry thereof in the original judgment entered in the judgment-book. Thereupon the clerk drew a line, in red ink, upon the face of the judgment, through the figures \$3,822.52, and inserted directly after them, in red ink, the figures \$5,769.52, and wrote on the margin, "Modified by the order of court, May 24, 1889." From this judgment Kaufman has appealed upon the judgment-roll alone, without any bill of exceptions.

1. The finding that Kaufman realized the sum of \$5,316.55 from the sale of the stocks belonging to McDonald, the respondent's assignor, is the basis of the judgment against him, and, in the absence of any qualifying finding of fact, would have authorized a judgment against him for that amount. The further finding that of the moneys received by McDonald the sum of \$1,494.03 was to be deducted from this amount, and that the remainder of the moneys received by her were to be treated as a dividend upon her general claim against Mackenzie, must be regarded upon this appeal as authorized by the evidence before the trial court. If the appellant would question the conclusion of this finding, it was incumbent upon him to except thereto, and have the evidence thereon presented in a statement or bill of exceptions. This finding is placed after the conclusions of law, and is given as a fact resulting from the other findings of fact, but does not cease to be a finding of fact by reason of its position. Upon the findings, therefore, the court was authorized to render the judgment which was originally given and entered in favor of the intervenor.

2. The subsequent modification of the judgment was unauthorized. After the court had rendered judgment in accordance with its findings, such judgment could be changed only through a motion for a new trial, or upon appeal. As a judgment must depend upon the conclusions of law drawn from the findings of fact (*Broder v. Conklin*, 98 Cal. 360), before a judgment drawn from these findings of fact can be changed, the findings of fact must themselves be changed so as to support a different judgment; and, as the court loses all power to change its findings of fact after the entry of judgment (*Smith v. Taylor*, 82 Cal. 533; *Los Angeles v. Lankershim*, 100 Cal. 532), the only mode in which the findings of fact can be changed is by means of a motion for a new trial. (*Egan v. Egan*, 90 Cal. 15.) This proposition is not controverted by the respondent, but it is claimed that the action of the court in modifying the judgment was authorized by a stipulation of all the parties to the action. This contention, however, is not sustained by the terms of the order, or of the stipulation upon which the order is based. The appellant not only did not sign the stipulation, but the order modifying the judgment recites that it was signed "by all the respective parties in this action, *except the defendant Kaufman*," and, also, that "said Kaufman, by his attorney, being present, and *having refused to sign any stipulation*, but expresses the willingness of the assignee to obey any order of the court in the cause." Whatever may have been intended by the statement of his attorney that the assignee was willing "to obey any order of the court in the cause," it did not confer upon the court any authority to modify the judgment that had been entered against him, by increasing the amount for which he was declared liable. The stipulation of the other parties for increasing the amount of the judgment against him could not confer any such authority, and, in the face of the express declaration by the attorney that his client refused to sign any stipulation, the court was not authorized to accept the attorney's statement of the "willingness" of his

client as the equivalent of a stipulation. The attorney is only the agent of the client for the management and conduct of the cause while it is pending before the court for determination, and, as such agent, he has authority to bind his client in all matters pertaining to the conduct and management of the suit. The ground upon which it is held that a client is bound by the stipulation of his attorney in those matters that are not directly connected with the conduct of the trial, or the procedure of the court in which the cause is pending, is the presumption that the client has given authority to his attorney to make such stipulation; but, whenever it appears that the attorney has entered into an agreement in direct opposition to the instruction of his client, there is no ground for such presumption. As a general rule, a stipulation of the attorney will be presumed to have been authorized by the client, as well in order to uphold the action of the court, as for the protection of the other party to the stipulation; but when the adverse party, as well as the court, is aware that the attorney is acting in direct opposition to his client's instructions or wishes, the reason of the rule ceases, and the court ought not to act upon the stipulation, nor can the adverse party claim the right to enforce a judgment rendered by reason thereof. For the purpose of prosecuting or defending an action the authority of an attorney ordinarily terminates with the entry of judgment (*Kellogg v. Gilbert*, 10 Johns. 220; 6 Am. Dec. 335; Weeks on Attorneys, sec. 239), except for the purpose of sustaining and enforcing the judgment, or seeking to have it set aside or reversed. When a judgment in the cause has once been entered under the direction of the court the rights of the client have been finally determined, and the attorney ceases to have any authority to consent to its modification to the prejudice of the client without his consent. In the present case the court had adjudged that the liability of the appellant to Davis was only \$3,822.52, and, before his attorney could consent that this liability might be increased by nearly \$2,000, there

was needed more than the presumption of authority which existed during the conduct of the trial, and prior to the rendition of the judgment. In *Preston v. Hill*, 50 Cal. 43, it was directly held that an attorney has no authority to bind his client by the compromise of a pending action without express authority from the client, and that the court is not authorized to enter a judgment upon such consent if the objection of the client is brought to its notice, or to enforce it in favor of the party for whom it was entered, with knowledge that it was given without the consent of the client. The principles of that case, and the reasoning of the court in its opinion, fully sustain the position of the appellant herein in resisting the action of the court in modifying the judgment which was originally entered against him.

3. It is urged by the appellant that the court erred in entering the judgment against him individually, rather than in his representative capacity; that as the findings of fact show that he received the money realized from the sale of the stocks as the assignee of Mackenzie, the judgment should run against him in the same manner. It is not necessary to determine whether this was error, as the respondent in his brief has consented that the judgment may be modified in this respect.

4. A motion was made to dismiss the appeal herein upon the ground that the transcript fails to show that the notice of appeal was served upon the respondent. In reply thereto the appellant has filed as a portion of the record in the cause in the superior court a copy of certain proceedings therein properly certified by the clerk of that court, from which it appears that the original notice of appeal has been lost, and that it has been established to the satisfaction of that court that the notice of appeal (a copy of which is set forth in the printed transcript herein) was, on the twenty-eighth day of January, 1880, served upon the attorney of record for the respondent herein, and a written admission of the service that said notice was by such attorney indorsed upon the same, and that the said notice of appeal was on the

same day filed in the office of the clerk of that court; and that the court thereupon made an order directing that a copy of said notice of appeal, together with the affidavit showing its original filing and service, be filed *nunc pro tunc*, and that the same has been so filed.

It was held in *Perri v. Beaumont*, 88 Cal. 108, that if the evidence of the service of a notice of appeal as contained in the transcript is defective, the appellant will be allowed to show by proper proof that a sufficient service had been made, and, under the rule there given, an appeal will not be dismissed for failure of the transcript to contain proof of the service of the notice, if the appellant is able to show that service has been, in fact, properly made. Section 1045 of the Code of Civil Procedure provides that: "If an original pleading or paper be lost, the court may authorize a copy thereof to be filed and used instead of the original"; and, upon the order of the court made in the present case, the substituted papers are entitled to the same weight as would be the originals.

The motion to dismiss the appeal is denied, and the superior court is directed to strike from the judgment the modification made therein May 24, 1889, and to cause the judgment against the appellant Kaufman to be entered against him as assignee of John Mackenzie, and in favor of the respondent Davis, for the sum of \$3,822.52, as of the date of its original entry, January 31, 1889.

GAROUTTE, J., and VAN FLEET, J., concurred.

Hearing in Bank denied.



[No. 18441. Department Two.—November 27, 1895.]

**JOSIAH BIDDICK, RESPONDENT, v. JOHN B. KOBLER, APPELLANT.**

**QUIETING TITLE—EVIDENCE—TOWNSITE PATENT—TRUST FOR OCCUPANTS—PROOF OF OCCUPANCY—DEED OF SUPERIOR JUDGE NOT CONCLUSIVE.**

In an action to quiet title, where the land in controversy is part of a townsite, which was surveyed and platted under section 2387 of the Revised Statutes of the United States, and a patent was issued therefor to the superior judge, in trust for the occupants, which trust was administered by the superior judge under the act of the legislature of California, approved March 30, 1868, and the amendments thereof, a deed of the superior judge to the plaintiff, in so far as it includes land which had never been in the occupancy of the plaintiff, but which is shown to have been, at the time of the patent and prior to the application therefor, in the occupancy of the defendant, is not conclusive against the defendant; and the defendant is entitled to prove his occupancy and his right thereto as against the plaintiff.

**Id.—OFFER OF EVIDENCE—IMPROPER METHOD—PRESUMPTION OF CONSENT**

**—ERRONEOUS RULING.**—Although a mere general offer of evidence to prove a variety of things, without producing the witnesses or evidence whereby they are to be proved, is an improper method of presenting offered evidence, yet, where no objection is made to the form of the offer upon the ground that the offer was an improper method, but objection is only taken to the evidence offered, it will be presumed upon appeal that the method used in making the offer was by consent; and, if the evidence offered is improperly rejected, the judgment will be reversed for the erroneous ruling.

**APPEAL** from a judgment of the Superior Court of Plumas County. G. G. CLOUGH, Judge.

The facts are stated in the opinion of the court.

*C. E. McLaughlin*, for Appellant.

The lower court erred in refusing to allow defendant to show "That at the time the survey and application for patent was made the land here in dispute was within the inclosure and fence of defendant, and was occupied by him. That the land was at no time in the possession of or occupied by plaintiff." It was the duty of the surveyor to ascertain and plat the precise boundaries and area of the land within defendant's inclosure. (Stats. 1868, sec. 3, p. 693.) The patent conveys to the

superior judge the land within the townsite, "in trust for the several use and benefit of the occupants." (U. S. Rev. Stats., sec. 2387.) The act of Congress is the paramount law. The legislature in prescribing rules for the execution of the trust cannot limit or extend the rights of claimants, or dispose of the trust in any other manner than is prescribed by the act of Congress, and if there is any provision to that effect in the statutes of this state, it is clearly inoperative and void. (*Lechler v. Chapin*, 12 Nev. 71; *Winfield Town Co. v. Maris*, 11 Kan. 128; *Clark v. Titus*, 11 Pac. Rep. 312 (Ariz., July 8, 1886); *Cofield v. McClelland*, 16 Wall. 335; *Pueblo v. Budd*, 19 Col. 579.) If the deed is given to a person not an occupant, that fact may be shown, and then the deed falls as absolutely void and of no effect. The trustee had no authority to execute it. (*Treadway v. Wilder*, 8 Nev. 98, 99; 9 Nev. 71; *Rathbone v. Sterling*, 25 Kan. 444; *Stringfellow v. Cain*, 99 U. S. 610; *Ashby v. Hall*, 119 U. S. 526; *Hall v. Ashby*, 2 Mont. 489; *Helena v. Albertose*, 8 Mont. 506.) The occupants acquire an absolute right the moment the land is entered. (*Pueblo v. Budd*, *supra*; *Eversdon v. Mayhew*, 65 Cal. 165; *Neil v. McNear*, 57 Cal. 426; *Cerf v. Pfleging*, 94 Cal. 134; *Morgan v. Lones*, 80 Cal. 319; *Townsend v. Little*, 109 U. S. 504.) Lands occupied but unclaimed could only be sold or disposed of under section 12. (Stats. 1868, pp. 696, 697.) An occupant within the meaning of the law is one who is a settler or resident, and in *bona fide* actual possession of the lot at the time the entry was made. (*Pratt v. Young*, 1 Utah, 347; *Cain v. Young*, 1 Utah, 361; *Lechler v. Chapin*, *supra*.) As an occupant, defendant was the equitable owner, in whom was vested an estate of inheritance, and to whom the trust must descend. (*Watson v. Sutro*, 86 Cal. 527.) The title was still the possessory title quieted by a release to the occupants of the title of the United States. It was still affected by the previous acts of the owners as though no new title had been acquired. (*Cerf v. Pfleging*, *supra*.) Acquiescence for a long period of years

in the boundary established estopped plaintiff to say that it was not the true boundary. (*Cavanaugh v. Jackson*, 91 Cal. 583; *Burris v. Fitch*, 76 Cal. 396, 397; *Helm v. Wilson*, 76 Cal. 483; *White v. Spreckels*, 75 Cal. 616; *Truett v. Adams*, 66 Cal. 223.) This is akin to the statute of limitations, and is admissible to show that while a party had title, he has lost it by his acts or omissions. (Code Civ. Proc., secs. 1870, 1962, 1963; *Columbet v. Pacheco*, 48 Cal. 397; *Burris v. Fitch*, *supra*.)

*Goodwin & Webb*, for Respondent.

It is not competent for counsel to make an offer of proof without stating to the court that he can sustain it by competent witnesses. (Thompson on Trials, secs. 678, 685.) It is the uniform practice of this state to present the witness or other character of proof at the time of making the offer. (*Chamberlain v. Vance*, 51 Cal. 77-9; *Hogaboom v. Ehrhardt*, 58 Cal. 232; *Bostwick v. Mahoney*, 73 Cal. 239, 240; 2 Am. St. Rep. 814.) When a tender of proof is made of facts in mass, some of which are admissible and some not, the offer is properly rejected as a whole. (Thompson on Trials, sec. 678; *Bostwick v. Mahoney*, *supra*; *Smith v. Arsenal Bank*, 104 Pa. St. 519.) Appellant must maintain that the deed from the judge to plaintiff is void for want of authority to execute it. This deed, like the patent which preceded it, is on general principles conclusive of every other question. (*Davis v. Weibold*, 139 U. S. 529, 530; *Irvine v. Tarbat*, 105 Cal. 237.) The occupants of the townsite were to be determined, and in the trust executed under such regulations as the legislative authority of the state or territory in which the same were situated should prescribe. (Rev. Stats., sec. 2387.) The power to execute the trust was vested in the county judge by the act of the legislature of this state. (Stats. as amended in 1871.) Under section 24 of the statutes of 1873-74 the defendant cannot be heard to say that the law had not been pursued correctly in issuing the deed to plaintiff. (*Lechler v. Chapin*, 12 Nev. 75.) Plaintiff is not estopped be-

cause of his long acquiescence in the boundary, as that principle applies only where title was vested in the parties fixing and maintaining the boundary. (*Ross v. Evans*, 65 Cal. 442, 443; *Lechler v. Chapin*, *supra*.)

THE COURT.—This action is prosecuted to quiet title to a small parcel of land claimed by the plaintiff to be a part of lot 3 in block 5 in the town of Crescent Mills, in Plumas County. The complaint is in the usual form.

The premises in controversy are within the townsite of Crescent Mills (an incorporated town), which was surveyed and platted in 1882 upon public lands of the United States, under the provisions of section 2387 of the United States Revised Statutes authorizing the judge of the county court to enter lands settled upon and occupied as a townsite, and for which a patent was issued by the United States, October 26, 1888, to the superior judge of said county, "in trust for the several use and benefit of the occupants thereof according to their respective interests; the execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted under such regulations as may be prescribed by the legislative authority of the state or territory in which the same may be situated."

The statute under which said trust was administered was the act of our legislature, approved March 30, 1868, and the amendments thereof. (For the original act see Stats. 1867-68, p. 692, and as amended see Stats. 1885, p. 115, or 1 Deering's Codes, under sec. 4442, p. 723.)

The plaintiff claims under a deed executed by the superior judge January 7, 1890, which purports to convey to him lot 3 in block 5, "as appear from the official plat of the survey of said townsite now on file and of record in the office of the county recorder of said Plumas county."

The defendant, in addition to denials, alleged that for more than twenty-two years before the commencement of the action, and at the time the townsite was surveyed

and platted, he was, and ever since has been, the sole and exclusive occupant of the disputed premises, and that neither the plaintiff nor his grantor had ever been in the possession or occupation thereof; that in 1871 defendant inclosed his lot and erected a boundary or division fence between the lands of plaintiff and defendant, and inclosed within defendant's inclosure the land in dispute; that plaintiff and his grantor agreed to and acquiesced in said boundary; that the said parcel in controversy had ever since remained inclosed as part of defendant's lot, and cultivated and improved as such, adversely to the plaintiff, down to the present time, and that he had paid all taxes thereon.

Plaintiff introduced in evidence the original plat and field notes of the townsite, and described the parcel in litigation (a triangular piece of ground in the southeast corner of lot 3), and also the patent for the townsite, and the said deed from the superior judge for said lot 3, and rested.

Thereupon counsel for the defendant offered to prove that in 1871 defendant built a line or division fence between his lot and that of the plaintiff which included within the boundaries and inclosure of the defendant the land here in dispute; that at the time the survey and application for patent were made the land in controversy was so within the inclosure of defendant, and was occupied by him; that the land in question was never at any time in the possession or occupancy of the plaintiff; that the boundary line or fence above mentioned was acquiesced in by the grantor of plaintiff and by the plaintiff for more than twenty-two years; that defendant had been in the adverse possession of the parcel in controversy, occupying and claiming the same, ever since 1872, and had paid all taxes, state, county, and municipal, levied upon the same, though the land, since 1882, has been assessed according to the town plat, which it was always supposed indicated the fence as the boundary between the two lots.

Plaintiff objected "to the offer as immaterial, in-

competent, and irrelevant with the exception of that we stated" (referring to the statute of limitations). The court thereupon ruled that "it is incompetent and immaterial as the statute stands," and made findings and entered judgment for the plaintiff. The defendant appeals from the judgment, the facts being brought into the record by a bill of exceptions; and the question here is whether the facts so offered to be proved would, if proved by competent evidence, constitute a defense to the action.

A mere general "offer" to prove a variety of things, without producing the witnesses or evidence whereby they are to be proved, or segregating the different items, is an improper method of presenting offered evidence, and should not be allowed unless by consent of parties. In the case at bar, however, the objection was not made upon the ground that the offer was an improper method; and therefore we will assume that this method was used by consent. And we think that the court below erred in sustaining the objection to appellant's said offer.

The appellant should have been allowed to prove, if he could, that when the deed of the judge was made to respondent, and during all of the time when preliminary steps were being taken to acquire title to the townsite and distribute the same to those entitled to particular parcels of land, the appellant was in the actual possession of the part of the lot here in contest, and that, therefore, respondent was not, during said time, the occupant thereof or in any way entitled to the same. Under the grant of Congress particular parcels of land are to go to the "occupants," or those entitled to the occupancy thereof; and the trust is to be executed under such regulations as the legislature of the state may prescribe. It was said by the supreme court of Kansas in *Rathbone v. Sterling*, 25 Kan. 448: "We do not doubt the power of the legislature to provide for a contest and decision in the first instance, and before the probate judge or commissioners, and to give to such trial all the

force and effect of a regular trial before a court"; and although, under the "regulations" prescribed by the legislature of California, the superior judge does not act judicially, but merely makes deeds under certain circumstances as a matter of course, still a provision that a deed of the judge should be conclusive against *all persons* who should not bring actions against the grantees within a specified time would, no doubt, be valid. There are provisions of that kind in our statutes as to *certain* persons; but we find nothing of the kind which is applicable to one in the alleged position of appellant—that is, one in the actual possession and occupancy of a piece of land and entitled to such occupancy. There are only three provisions of the statute relating to the conclusiveness of the judge's deed—section 24 (of the act of March 12, 1885), section 11 and section 10. Section 24 relates merely to the regularity of the preliminary proceedings; section 11, refers merely to the bringing of an action by a "party out of possession"; and section 10 provides that an action for "the recovery of the possession of such premises" must be brought within a certain time after the recording of the deed. Appellant's rights are not affected by either of these provisions. Whether or not he has any right in the premises which would warrant a court in giving him any affirmative relief is not a question in this case. Respondent brought this action relying upon his paper title, viz., his deed from the judge; and appellant may rely upon his actual possession as a defense to the action, if he can show that at the time of the execution of said deed he was the occupant and *entitled to the occupancy* of the land in contest, and respondent never was either the occupant or entitled to the occupancy of said land. If respondent was not the occupant, within the meaning of the grant of Congress, he was not entitled to the deed from the judge; and, as we have seen, there is no statutory provision making the deed conclusive as against appellant. These views are sustained by the following authorities, which, indeed, go much farther in the same

direction than we are called upon to go here: *Treadway v. Wilder*, 8 Nev. 91; 9 Nev. 71; *Lechler v. Chapin*, 12 Nev. 65; *Rathbone v. Sterling*, *supra*; *Helena v. Albertose*, 8 Mont. 499; *Hall v. Ashby*, 2 Mont. 489.

The judgment is reversed, and the cause remanded for a new trial.

[No. 18373. Department One.—November 28, 1895.]

**A. ROSENTHAL AND WIFE, RESPONDENTS, v. MERCED BANK, APPELLANT.**

**HOMESTEAD—TENANCY IN COMMON—SUBSEQUENT CONVEYANCE OF TITLE.**—A homestead cannot be created upon land held in cotenancy, in favor of one of the cotenants, and where a homestead is declared upon land so held, it is invalid and cannot become a homestead by a subsequent conveyance from the other cotenant.

**ID.—INVALID DECLARATION OF HOMESTEAD—CONVEYANCE BY HUSBAND.**—Where a declaration of homestead is invalid by reason of a cotenancy existing at the time of the declaration, the title of the husband in the community property is not thereby affected, and can be conveyed by a deed from himself alone, without acknowledgment.

**ID.—PROOF OF DEED—COPY ANNEXED TO ANSWER—FAILURE TO FILE AFFIDAVIT—ADMISSION OF EXECUTION AND GENUINENESS.**—Where a copy of a deed from the plaintiff to the defendants is annexed to the answer of the defendant in an action to quiet title, if no affidavit denying its genuineness and due execution is filed, the same are deemed admitted, and it is not necessary for the defendant to offer the deed in evidence.

**APPEAL** from a judgment of the Superior Court of Merced County. JOSEPH H. BUDD, Judge.

The facts are stated in the opinion of the court.

*James F. Peck*, for Appellant.

A homestead cannot be declared upon property held in common. (*Fitzgerald v. Fernandez*, 71 Cal. 505; *Reynolds v. Pizley*, 6 Cal. 165; *Bishop v. Hubbard*, 23 Cal. 517; 83 Am. Dec. 132; *Elias v. Verdugo*, 27 Cal. 418; *Seaton v. Son*, 32 Cal. 483.) The genuineness and due execution of the deed by the defendant are admitted by the pleadings. (Code Civ. Proc., sec. 448; *Crowley v. City R. R. Co.*, 60 Cal. 628; *Clark v. Child*, 66 Cal. 87;



*Ward v. Clay*, 82 Cal. 505; *Brown v. Weldon*, 71 Cal. 393; *Waldrip v. Black*, 74 Cal. 409; *Sloan v. Diggins*, 49 Cal. 40.) The admission includes an admission of acknowledgment so far as is necessary, and a certificate of the notary is not essential to genuineness and due execution. (*Le Mesnager v. Hamilton*, 101 Cal. 532; 40 Am. St. Rep. 81; *Wedel v. Herman*, 59 Cal. 507; *Joseph v. Dougherty*, 60 Cal. 358; *Banbury v. Arnold*, 91 Cal. 606; *Sloan v. Diggins*, *supra*.)

*Frank H. Farrar*, for Respondents.

The acknowledgment of the instrument annexed to the answer is void as against the homestead. (Civ. Code, secs. 1093, 1187, 1242; *Jackson v. Torrence*, 83 Cal. 521; *Leonis v. Lazzarovich*, 55 Cal. 52; *Wedel v. Herman*, 59 Cal. 507; *Tolman v. Smith*, 74 Cal. 345; *Joseph v. Dougherty*, 60 Cal. 358; *Hodges v. Winston*, 95 Ala. 514; 36 Am. St. Rep. 241; *Edinburg etc. Mortgage Co. v. Peoples* (Ala., Jan. 16, 1894), 14 South. Rep. 656; *Smith v. Pearce*, 85 Ala. 264; 7 Am. St. Rep. 44; *Gage v. Wheeler*, 129 Ill. 197; *Jones v. Robbins*, 74 Tex. 615.) Since the adoption of the Civil Code the court should follow the more liberal rule allowing the claim of a cotenant to exemption of a homestead of land in which he is in exclusive possession. (Civ. Code, sec. 1237; *Freeman on Cotenancy and Partition*, sec. 54; *Horn v. Tufts*, 39 N. H. 483; *Thorn v. Thorn*, 14 Iowa, 53; 81 Am. Dec. 451; *McClary v. Bixby*, 36 Vt. 254; 84 Am. Dec. 684; *Greenwood v. Maddox*, 27 Ark. 660; *Robinson v. McDonald*, 11 Tex. 385; 72 Am. Dec. 480; *Robson v. Hough*, 56 Ark. 621; *Giles v. Miller*, 36 Neb. 346; 38 Am. St. Rep. 730; *Lewis v. White*, 69 Miss. 352; 30 Am. St. Rep. 557; *Oswald v. McCauley*, 6 Dak. 289.)

THE COURT.—Rosenthal and wife brought this action to quiet their title to lot 7 in block 147 in the city of Merced. The complaint was in the usual form. Defendant answered, and, in addition to denials, alleged that since July 20, 1893, it has been the owner in fee

simple of said premises, "on which said last-mentioned date the said plaintiffs made, executed, acknowledged, and delivered to defendant their certain deed in writing, a copy of which said deed is hereto annexed, marked exhibit A, and hereby referred to and made a part hereof; and on the 11th of October, 1893, in an action then pending before the superior court of Merced county, between the same parties hereto, by the judgment of said court, duly given and made, it was adjudged and decreed that said deed transferred and conveyed said premises described in the complaint herein to defendant, and said judgment has never been reversed, annulled, or set aside, and the same is now a final judgment of said court." Said exhibit A, attached to said answer, purports to be a copy of a deed signed by A. Rosenthal and Betsy Rosenthal, said signatures being followed by the words: "Signed, sealed, and delivered in the presence of Samuel C. Bates," but no acknowledgment appears thereon. The plaintiff did not file or serve an affidavit denying the genuineness and due execution of said deed under the provisions of section 448 of the Code of Civil Procedure.

The cause was tried by the court, and findings and judgment were in favor of the plaintiffs, and from said judgment the defendant appeals upon the judgment-roll, including a bill of exceptions. A preliminary recital under the head of findings of fact and conclusions of law states, among other things, that "the defendant failed and refused to introduce any evidence whatever in said cause."

The following are in substance the facts found, viz: That plaintiffs are, and since prior to the year 1877 have been, husband and wife; that on March 10, 1877, Charles Crocker was the owner in fee of said lot, and on that day granted and conveyed the same to the plaintiff, A. Rosenthal, and his brother, D. Rosenthal, and that said deed was duly recorded in said year; that on and prior to June 15, 1882, the plaintiffs resided with their family in a dwelling-house upon said lot, and

claimed and used said lot and dwelling as their home and homestead; that said A. Rosenthal has never selected any homestead; that on the 15th of June, 1882, said Betsy Rosenthal selected the said lot and dwelling-house as the homestead of herself and her said husband, and executed and acknowledged the selection and declaration of said homestead in due form for the joint benefit of herself and husband, and said declaration was duly filed for record and recorded in the office of the county recorder of said county on June 16, 1882; that "said premises so selected as a homestead were at the time of such selection in the exclusive occupation of the plaintiffs, and were inclosed with a picket fence, and they have been ever since such selection, and are now, inclosed with a picket fence, and in the exclusive possession of the plaintiffs as their homestead," and that the actual cash value of said premises at the time of said selection was two thousand five hundred dollars, and that the present actual cash value does not exceed three thousand dollars.

That on the twentieth day of July, 1883, said D. Rosenthal executed and delivered to said A. Rosenthal a grant, bargain, and sale deed of said premises, which was duly acknowledged, and was afterward, on the fourth day of August, 1883, duly recorded; and that plaintiffs have ever since the execution of said deed been the owners in fee, and as their homestead, of said lot No. 7, mentioned in the complaint.

The bill of exceptions specifies that the evidence is insufficient to justify the finding that the plaintiffs have, ever since the execution of said deed of D. Rosenthal to A. Rosenthal, been the owners in fee and as their homestead of the said lot, because, as appellant claims, the deed alleged in defendant's answer, and the genuineness and due execution of which are admitted by the pleadings, was a transfer and conveyance of said premises from plaintiffs to defendant.

It is admitted by plaintiffs' attorney that no affidavit denying the genuineness and due execution of the deed,

a copy of which was attached to defendant's answer, had been made or served upon defendant.

Upon these facts appellant contends: 1. That a homestead cannot be declared upon realty held in tenancy in common; that, therefore, the lot in question was not a homestead, and could be conveyed by the deed such as is attached to the answer whether it was acknowledged or not; and 2. That whether the lot was a homestead or not, all the title that plaintiffs attempted to prove was acquired by them prior to the date of the deed to defendant set out in the answer, and that the genuineness and due execution of that deed are admitted by the pleadings, plaintiff having failed to file an affidavit denying its genuineness and due execution. It is conceded that, at the time the declaration of homestead was filed, the legal title to the lot in question was vested in A. and D. Rosenthal, as tenants in common.

It has been uniformly held in this state that a homestead cannot be created upon land held in cotenancy, or tenancy in common, in favor of one of the cotenants (*Wolf v. Fleischacker*, 5 Cal. 244; 63 Am. Dec. 121; *Giblin v. Jordan*, 6 Cal. 416; *Seaton v. Son*, 32 Cal. 481; *Cameto v. Dupuy*, 47 Cal. 79; *First Nat. Bank v. De la Guerra*, 61 Cal. 109; *Fitzgerald v. Fernandez*, 71 Cal. 504), even though the declarant supposed himself to be the sole owner (*Seaton v. Son*, *supra*), and that a conveyance by the husband and wife of an undivided moiety of the land would destroy the homestead right. (*Carroll v. Ellis*, 63 Cal. 440.) As early as 1865 it was said, in answer to an effort to overturn this rule: "It is now too late to reinvestigate the reasons upon which those decisions are based. The first of the series, *Wolf v. Fleischacker*, *supra*, was made nine years ago. The decision was affirmed in several cases (naming them), and since that time the construction of the statute upon the point involved has been regarded as settled. The parties in this case may have relied upon those decisions in dispensing with the signature of the wife to the mortgage." (*Elias v. Verdugo*, 27 Cal. 418.) As recently as *In re Carriger's*

*Estate*, 107 Cal. 618, it was said: "It is well settled in this state that a homestead cannot be created by a cotenant in lands held by tenancy in common." Under these uniform decisions it must be held that, at the time that the declaration of homestead was filed by Mrs. Rosenthal, the land was not susceptible of being impressed with a homestead. It is equally clear that, unless the land was impressed with the characteristics of a homestead at the time of making and filing her declaration, it did not become a homestead by any subsequent act of a third party, or by the subsequent conveyance from the cotenant to her husband. (See *Reynolds v. Pixley*, 6 Cal. 165.) Sections 1262-64 of the Civil Code prescribed the mode of creating a homestead in lands, and the mode thus prescribed is exclusive.

The declaration of homestead by Mrs. Rosenthal did not, therefore, create a homestead in the land, and the title of her husband therein was not affected, but could be conveyed by a deed from himself alone, and it was not necessary that his deed should be acknowledged in order to be effective as a transfer of his title. A copy of this deed was annexed to the answer of the defendant, and, as the plaintiffs did not file an affidavit denying its genuineness and due execution, they are "deemed admitted" (Code Civ. Proc., sec. 448), and it was not necessary for the defendant to offer the deed in evidence.

The judgment is reversed.

[No. 18457. Department Two.—November 29, 1895.]

**JULIA E. KUMLE, RESPONDENT, v. GRAND LODGE  
ANCIENT ORDER OF UNITED WORKMEN OF  
CALIFORNIA, APPELLANT.**

**MUTUAL BENEFIT SOCIETY—ACTION UPON CERTIFICATE—COMPLIANCE OF MEMBER WITH RULES—GOOD STANDING—EVIDENCE—PRESUMPTION—BURDEN OF PROOF.**—In an action by the widow of a deceased member of a mutual benefit society, brought upon a certificate issued to such member, entitling him to participate in a specified sum in the beneficiary fund of the order, to be paid at his death to his wife, on condition that he shall, while a member of the order, comply with its rules and requirements, where issue is joined as to such compliance, the burden upon the plaintiff of proving that the deceased was a member of the order in good standing at the time of his death is sufficiently sustained by introducing the certificate of membership, which is evidence of his good standing when issued, and such good standing will be presumed to continue in the absence of proof to the contrary; and the burden devolves upon the society to rebut such presumption by showing the loss of such good standing, by failure to comply with the rules, or to pay required assessments.

**ID.—SUBMISSION OF CONTROVERSY—ARBITRATION—APPEAL TO SUPREME GRAND LODGE—REFUSAL TO PAY—JURISDICTION OF COURT.**—Where there is nothing in the certificate, or in the laws or regulations of the order, requiring a controversy between the widow of a deceased member, to whom the certificate is payable, to be submitted to the order for adjustment, or making its action thereon final, the fact that the widow presented the certificate and proofs of death to another member of the subordinate lodge, and that such member, upon refusal by the subordinate lodge to acknowledge the claim, requested the grand lodge to approve the claim, which it also refused to do, does not show a submission of the controversy in the sense of an arbitration; nor does the right given to a member to appeal to the supreme grand lodge affect the rights or obligations of the widow, who is not a member of the order; nor does the refusal of the order to pay the claim constitute a final adjudication thereof, or affect the jurisdiction of the superior court to enforce the claim.

**NEW TRIAL—STATEMENT—VERDICT OF JURY—INSUFFICIENCY OF EVIDENCE—SPECIAL FINDINGS—IMPROPER SPECIFICATIONS.**—An allegation in a statement upon a motion for a new trial, under the head of "Insufficiency of the evidence to justify the verdict" as to what the evidence established, is insufficient as a specification of particulars, wherein the evidence is insufficient; nor can special findings of the jury be properly assailed by a general statement, under the head of "Errors of law occurring at the trial," that the verdict of the jury on each special issue "was error."

**APPEAL** from a judgment of the Superior Court of Yuba County and from an order denying a new trial.  
**E. A. DAVIS, Judge.**

The facts are stated in the opinion.

*Eugene Deuprey*, and *C. A. Webb*, for Appellant.

The doctrine of waiver has no application to forfeiture of mere benefits in fraternal orders, but the membership ceases upon noncompliance with rules. (*Borgraefe v. Supreme Lodge*, 22 Mo. App. 127; *Rood v. Railway etc. Mut. Ben. Assn.*, 31 Fed. Rep. 62; *Hogins v. Supreme Council*, 76 Cal. 109; 9 Am. St. Rep. 173; *Lyon v. Supreme Assembly*, 153 Mass. 83.) By failing to exhaust the procedure in the order, through appeal from the decision in the grand lodge, plaintiff has no right to proceed in the courts. (*Toram v. Howard Ben. Assn.*, 4 Pa. St. 519; *Fritz v. Muck*, 62 How. Pr. 70; *Anacosta Tribe No. 12, I. O. R. M.*, v. *Murbach*, 13 Md. 91; *Osceola Tribe etc. v. Schmidt*, 57 Md. 98; *Hawkshaw v. Supreme Lodge Knights of Honor*, 29 Fed. Rep. 773; *McAlees v. Supreme Order Iron Hall*, 13 Atl. Rep. 755 (Pa., April 23, 1888); *Appeal of Sperry*, 116 Pa. St. 391; *Woolsley v. I. O. O. F.*, 61 Iowa, 492; *Harrison v. Hoyle*, 24 Ohio St. 254; *Black etc. Soc. v. Van Dyke*, 2 Whart. 309; 30 Am. Dec. 263; *Commonwealth v. Pike Ben. Soc.*, 8 Watts & S. 247.)

*W. H. Carlin*, and *Jacob Samuels*, for Respondent.

The production of the certificate of membership made a *prima facie* case for plaintiff, and the burden was upon the defendant to show noncompliance with the regulations. (*Knights of Honor v. Johnson*, 78 Ind. 110, 113; *Demings v. Knights of Pythias*, 14 N. Y. Supp. 834; *Tobin v. Western Mut. Aid Soc.*, 72 Iowa, 261; *Scheufler v. Grand Lodge etc.*, 45 Minn. 256; *Elmer v. Mutual Ben. Life Assn.*, 19 N. Y. Supp. 289.) The rules of the order only apply to members, and not to beneficiaries who are not members. (*Strasser v. Staats*, 59 Hun, 143; *Buekofzer v. Grand Lodge*, 61 Hun, 625; *Dobson v. Hall*, 11 Pa. Co. Ct. Rep. 532.) Appellant's specifications are insufficient to authorize a review of the evidence. (Code Civ. Proc., sec.

659; *Eddelbuttel v. Durrell*, 55 Cal. 277; *Menk v. Home Ins. Co.*, 76 Cal. 50; 9 Am. St. Rep. 158; *Knott v. Peden*, 84 Cal. 299; *Spotts v. Hanley*, 85 Cal. 155; *Baird v. Peall*, 92 Cal. 235; *Dawson v. Schloss*, 93 Cal. 195; Hayne on New Trial and Appeal, 428, 432, 698; *Alhambra etc. Water Co. v. Richardson*, 72 Cal. 598, 601.) Special findings cannot be assailed as error of law. (*Smith v. Christian*, 47 Cal. 18; *Shepherd v. Jones*, 71 Cal. 223, 225; *Heilbron v. Centerville etc. Ditch Co.*, 76 Cal. 8, 10.)

SEARLS, C.—Appeal from a judgment in favor of plaintiff and from an order denying defendant's motion for a new trial.

The action is brought by Julia E. Kumle to recover two thousand dollars as the beneficiary named in a certain beneficiary certificate issued by the defendant corporation to Peter Kumle, on the fourteenth day of November, 1870, in the words and figures following:

“Grand Lodge, Ancient Order of United Workmen of California.

“No. 8,007.

\$2,000.

“This certificate, issued by the authority of the Supreme Lodge of the Ancient Order of United Workmen, *witnesseth*:

“That brother Peter Kumle, a Master Workman Degree member of Sharon Lodge No. 142, of said order, located at Brownsville, in the state of California, is entitled to all the rights and privileges of membership in the Ancient Order of United Workmen, and to participate in the beneficiary fund of the order to the amount of \$2,000, which sum shall, at his death, be paid to his wife, Mrs. Julia E. Kumle. This certificate is issued upon the express condition that said Peter Kumle shall, in every particular, while a member of said order, comply with all the laws, rules, and requirements thereof.

“*In witness whereof*, the Grand Lodge of California has caused this to be signed by its Grand Master Workman and Recorder, and the seal thereof to be attached



this 14th day of November, one thousand eight hundred and seventy-nine.

"Attest: H. G. PRATT, Grand Recorder.

"WILLIAM H. JORDAN,

"Grand Master Workman.

"(Seal of the Grand Lodge.)

"We, the undersigned, Master Workman and Recorder of Sharon Lodge No. 142, do hereby countersign this certificate and attach the seal of this lodge hereto, rendering the same valid and in full force, this 29th day of November, 1879.

" A. J. HANKIN,

"Master Workman.

"Attest: F. P. THURMAN, Recorder.

"(Seal of Subordinate Sharon Lodge, No. 142.)"

The complaint may be said to be in the usual form in such cases. It contains a copy of the foregoing certificate, and among other allegations, avers the acceptance of the certificate by Peter Kumle; that he in every particular complied with all the laws, rules, and requirements of the Ancient Order of United Workmen; that he, up to the time of his death, which occurred December 4, 1891, contributed to the funds of the order as required by the laws and rules thereof, and had, at the time of his death, duly performed all the conditions on his part to be performed in relation to said beneficiary certificate, and in relation to the payment thereto, to entitle the beneficiary named therein to have and recover two thousand dollars, as in said certificate set forth, etc.

The answer specified the objects of the corporation defendant; admitted the membership and issuance of the certificate to Kumle, but denied that he continued to be *or was such* member at the date of his death, or that he complied with the laws and regulations of defendant, and averred his suspension from the order for nonpayment of assessments more than six months before his death; set forth portions of the constitution of

the order providing for suspension for nonpayment of assessments, etc.

At the trial the plaintiff introduced in evidence the foregoing certificate, proved that plaintiff was the wife of Peter Kumle during his lifetime and the person named in the certificate as the beneficiary, that Peter Kumle died December 4, 1891, and that no portion of the two thousand dollars mentioned in the certificate had been paid, and thereupon rested her case.

Counsel for defendant moved for a nonsuit upon the grounds that plaintiff had failed to support the allegations of her complaint, or to show that the provisions of the certificate had been complied with by Peter Kumle, to whom the certificate issued, and that the proofs failed to support the allegations of the complaint upon which the right to recover was based.

The court overruled the motion, to which ruling counsel for defendant excepted, and the action of the court is assigned as error.

The question involved in appellant's motion, broadly stated, is this:

Was the burden of proof cast upon plaintiff to show that, under the certificate issued to him by the defendant, he had in every particular, while a member of the order, complied with *all the laws, rules, and requirements* thereof, as provided in said certificate, and, if so, was the proof sufficient to support the allegations in this behalf?

The complaint avers in general terms such compliance. The answer denies such compliance, and avers that Kumle had failed to pay his assessments; that on March 29, 1891, he was suspended for the nonpayment of assessments for the month of March, 1891, and had not, up to the time of his death, been restored to membership, and was not at the date of his death a member of the order.

The whole question is in a nutshell. The plaintiff's right of recovery being dependent upon the fact that

the deceased was a member in good standing at the time of his death, and such fact being denied by the answer, the burden of proof to establish it is on the plaintiff. (*Siebert v. Chosen Friends*, 23 Mo. App. 268.)

But the issuing of a certificate of membership by a mutual benefit society is evidence of the holder's good standing in the order when it is issued, and such good standing will be presumed to continue, unless there is legitimate proof that it no longer exists, and to rebut such presumption it devolves upon the defendant (in the absence of proof thereof by plaintiff) to show the loss of such good standing. (*Independent Order of Foresters v. Zak*, 136 Ill. 185; 29 Am. St. Rep. 318; *Stewart v. Supreme Council American Legion of Honor*, 36 Mo. App. 319; *Mulroy v. Knights of Honor*, 28 Mo. App. 463; *Supreme Lodge v. Johnson*, 78 Ind. 110; *Mills v. Rebstock*, 29 Minn. 380; *Elmer v. Association*, 19 N. Y. Supp. 289.)

In *Stewart v. Supreme Council American Legion of Honor*, *supra*, the court, in affirming the action of the court below in denying a nonsuit, said: "We think the court did not err in refusing to nonsuit the plaintiff. The plaintiff made out a *prima facie* case by offering the benefit certificate, which recites that Hugh Stewart is a member in good standing, and that she offered to make proof of his death to the defendant, which the defendant refused to receive. The *status* of the member once fixed is presumed to continue."

"In an action upon a life insurance policy, although the answers in the application are warranties, the burden of proof is on the defendant to show the falsity of any such answers, in accordance with the general rule that the law does not require a party to prove a negative." (Bacon on Benefit and Insurance Societies, sec. 469; *Piedmont etc. Ins. Co. v. Ewing*, 92 U. S. 377; *Insurance Co. v. Gridley*, 100 U. S. 614.)

The burden of establishing the failure to pay assessments is upon the defendant. (*Tobin v. Western etc. Soc.*, 72 Iowa, 261; *Spencer v. Citizens' Mut. etc. Ins. Co.*, 142 N. Y. 505; Black on Benefit and Insurance Socie-

ties, sec. 454, and cases there cited.) The motion for a nonsuit was properly denied.

2. Appellant claims that the court had no jurisdiction to hear and determine this cause, for the reason that the claim of plaintiff was submitted to the grand lodge of California, which decided against the validity of the claim, and no appeal was taken therefrom to the "supreme lodge."

The contention is that plaintiff, "having failed to exhaust such procedure and take such appeal, she waived the right to appeal, and also any right to proceed in the courts of the land, as against the tribunal of the order."

I fail to observe anything in the record which brings the plaintiff within the rules of law invoked by appellant.

1. There is nothing in the certificate, constitution, laws, or regulations of the order, so far as the records show, requiring differences of the character involved in the present controversy to be submitted to the order for adjustment, or, if submitted, making its action final.

2. There was no submission of the controversy in the sense of an arbitration.

The "Ancient Order of United Workmen" is a fraternal, charitable, beneficial, and benevolent order, and is governed by a supreme lodge, and, in this state, by the "Grand Lodge of Ancient Order of United Workmen of California," and by subordinate lodges.

The grand lodge of California has exclusive original jurisdiction over all subordinate lodges, subject to the provisions of the supreme lodge constitution, and right of appeal.

The grand lodge, by its constitution, "guarantees to each member of the order of the W. (Workmen) degree (to be paid to such person or persons as said member may have directed while living) the sum of two thousand dollars, provided said member shall have complied in all particulars with all the laws, regulations, and requirements of the order."

It issues all certificates which are to be countersigned

by the master workman of the subordinate lodge of which the recipient is a member, with the seal of the subordinate lodge attached, etc.

Peter Kumle was a member of one of these subordinate lodges, viz., of Sharon Lodge, No. 142, situate at Brown's Valley in the county of Yuba, and, as such member, received in due form the certificate hereinbefore set forth.

The constitution of subordinate lodges provides, in reference to appeals therefrom, that "Any member considering that injustice has been done by the decision of the lodge may, within one month thereafter, appeal in writing to the G. M. W. of (or) grand lodge if in session," etc.

This right of appeal is given to members only, and cannot apply to the plaintiff who was not a member.

What she did in fact do was to present her papers and proofs of death to one Meek, who was a member of the order, to submit them for her to the grand lodge, and to secure and demand from it the payment of the two thousand dollars.

Meek filed a written request that the grand lodge would consider the matter, giving reasons therefor, and showing that the subordinate lodge had refused to acknowledge the claim.

The grand lodge appointed a committee, which reported against payment, and its report was approved.

The privilege of an appeal from the grand lodge is given as follows: "Any member of the grand lodge, or any party to an appeal determined by the grand lodge, may appeal to the supreme lodge from the decision of such grand lodge."

As plaintiff was not and could not be a party to an appeal determined by the grand lodge, and was not a member thereof, she could not appeal therefrom to the supreme lodge.

In all this, and in the absence of some rule or law of the order in view of which the contract might be supposed to have been made, I observe nothing to differ-

entiate the application of plaintiff to defendant for the payment of her demand from the ordinary demand of payment by a creditor from his debtor. The alleged debtor, being a corporation, in its refusal to pay acted through the channel or medium usually provided for reaching a conclusion in similar cases.

"An association cannot, by its constitution or by-laws, confer judicial powers upon its officers or committees so as to enable such officers or committee (without voluntary submission to their authority on the part of lodges or members) to adjudge a forfeiture of property rights, or to deprive lodges or members of their property, or to arbitrarily take property away from one set of members and give it to another set. This is on the ground that the creation of judicial tribunals is one of the functions of sovereign power and because to allow such powers to be conferred would be contrary to public policy, just as agreements to refer future controversies to arbitration cannot be enforced.

"An adjudication of these officers, or committees, which has this effect of forfeiture of property, or property rights, is not good either as an award or as a judgment." (Bacon on Benefit and Insurance Societies, sec. 123, and cases there cited.)

It must not be understood from the foregoing quotation that grand lodges may not by their laws regulate the internal polity of the lodges under their jurisdiction, or that subordinate lodges may not by their regulations provide when, how, and under what circumstances membership and consequent rights and privileges may be obtained and lost.

The question of the extent to which such regulations may reach, and of the power of the associations to make their determination thereof final, involves considerations upon which there is a wide divergence of opinion as expressed in the reported cases.

We are not concerned with that question, for the reason that in the present case the defendant has not attempted by its laws to make its action either exclusive

or final, and upon the money demand of the plaintiff, growing out of a contract with the defendant, we have no doubt but that the superior court of Yuba county had jurisdiction.

Defendant's notice of motion for a new trial stated as one of the grounds of the motion "Insufficiency of the evidence to justify the verdict, and that it is against law."

The statement on motion for new trial contains no such specification of the insufficiency of the evidence as will warrant us in an examination of the question. Section 659 of the Code of Civil Procedure provides that "when the notice of the motion designates, as the ground of the motion, the insufficiency of the evidence to justify the verdict or other decision, the statement shall specify the particulars in which such evidence is alleged to be insufficient."

There is not, in fact, any specification in the statement of the particulars in which the evidence is alleged to be insufficient.

In the assignment of errors, and under the head of "Insufficiency of the evidence to justify the verdict," there is a statement consisting of four paragraphs, in which the attorney sets forth his views of the result of the testimony. We quote the first paragraph as fairly illustrative of the whole. It is as follows:

"The evidence conclusively established that Peter Kumle was, by operation of law of the order and binding upon him, suspended from the subordinate lodge, Sharon, No. 142, A. O. U. W., and from all of the benefits and privileges of the Ancient Order United Workmen, California, March 28, 1891. Also, that said Peter Kumle was not at any time reinstated or his beneficiary certificate renewed under the laws of the order after March 28, 1891. Furthermore, the proof positively determined the fact that Peter Kumle was not in the order, A. O. U. W., California, either in good standing or at all, when he died, December 4, 1891, and that all rights and privileges that he may ever have had were

long previously forfeited and waived by his own acts, and that his beneficiary certificate stood avoided and of no effect."

This question was fully considered in the late case of *Dawson v. Schloss*, 93 Cal. 194, and the opinion in that case is so full and explicit that nothing need be added here to show the defects in the present statement. (See, also, *Baird v. Peall*, 92 Cal. 235; *Menk v. Home Ins. Co.*, 76 Cal. 50; 9 Am. St. Rep. 158; *Eddelbuttel v. Durrell*, 55 Cal. 277; *Spotts v. Hanley*, 85 Cal. 155; *Parker v. Reay*, 76 Cal. 103.)

In this case there was, in addition to the general verdict, special findings by the jury upon twenty-three special issues submitted to them, which findings are objected to in the following manner: Under the head of "Errors of law occurring at the trial and excepted to by the defendant" is the following: "The verdict on special issue 1 was error," and the same statement is made as to each of the findings upon the other twenty-two issues.

These special findings, which are in themselves amply sufficient to support the judgment, stand without valid objection. The other objections urged do not call for special mention. There are a few errors of law assigned, based upon the admission and rejection of evidence, but, as they are not urged by appellant, we need not comment upon them.

The judgment and order appealed from should be affirmed.

VANCLIEF, C., and HAYNES, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

McFARLAND, J., TEMPLE, J., HENSHAW, J.

Hearing in Bank denied.

BEATTY, C. J., dissented from the order denying a hearing in Bank.



[S. F. No. 195. Department One.—November 29, 1895.]

**A. L. WULFF, PETITIONER, v. SUPERIOR COURT OF  
SAN JOAQUIN COUNTY, RESPONDENT.**

**PARTNERSHIP—ACTION FOR DISSOLUTION—SALE OF ASSETS BY RECEIVER BEFORE DECREE—JURISDICTION.**—In an action for an accounting and dissolution of a partnership, where the assets of the business have been placed in the hands of a receiver, and it appears to the court that they are not equal to the liabilities of the firm, and that the business has been carried on by the receiver at a loss, and that the loss will be further increased if the business is continued, and that it is for the best interest of the partnership that the business be sold as a whole, the court has jurisdiction to order a sale of the business, as being in its nature perishable property, prior to a decree of dissolution of the partnership.

**ID.—NECESSITY OF SALE—PRESERVATION OF ASSETS—POWER OF COURT.**—The court has the power to sell partnership assets by reason of an actual present necessity of sale, in order that the assets may be preserved to the final interest of the parties interested therein.

WRIT of review in the Supreme Court to review the action of the Superior Court of San Joaquin County in ordering the sale of partnership property in the hands of a receiver. J. K. LAW, Judge.

The facts are stated in the opinion of the court.

*Paul C. Morf*, for Petitioner.

There must first be a dissolution of the copartnership by consent of the partners or by a decree of the court, before a sale of the partnership business can be ordered. (1 Story's Equity Jurisprudence, 677-80; 3 Wait's Actions and Defenses, 155, 177; Collyer on Partnerships, pars. 307, 311, 313; *Washburn v. Goodman*, 17 Pick. 530.)

*John E. Budd*, and *F. H. Gould*, for Respondent.

The court had a right to order the sale to be made to prevent increased loss and expense. (*McLane v. Placerville etc. R. R. Co.*, 66 Cal. 606; *Pacific Ry. Co. v. Wade*, 91 Cal. 449; 25 Am. St. Rep. 201; *Brush v. Jay*, 113 N. Y. 482; *Brande v. Bond*, 63 Wis. 142; *Crane v. Ford*, Hopk. Ch. 130; *Williams v. Wilson*, 4 Sand. Ch.

379; *Marten v. Van Schaick*, 4 Paige, 479; *Allen v. Hawley*, 6 Fla. 142; 63 Am. Dec. 211; 20 Am. & Eng. Ency. of Law, 145.)

GAROUTTE, J.—This is a writ of review, to review the action of the superior court of San Joaquin county, in ordering a sale of certain partnership property now in the hands of a receiver, consisting of the stock and goodwill in a certain paint, oil and wall-paper business in the city of Stockton.

The action of *Parsons v. Wulff*, was for a dissolution of a partnership and an accounting. Wulff filed his answer, denying the allegations of the complaint, and the cause had not come to trial at the time the order for a sale of the partnership business was made. It is contended upon the part of petitioner that until a dissolution of the partnership had been decreed by the court, it had no power to order a sale of the partnership business, and such is the question presented for our consideration. The record of the lower court is before us, including certain supplemental findings of fact made by it, and by that record, taken as a whole, this jurisdictional question must be determined. (*Blair v. Hamilton*, 32 Cal. 52.) The record discloses the petition for sale to have been filed by the receiver, and the petition states that the partnership is largely insolvent; that it is for the best interests of the creditors and the partnership that the business be sold, and that it be sold as a whole; that the business, since it came into the hands of the receiver, has been carried on at a loss, and that the loss will be still further increased if the business is continued; that the business has been conducted in a proper and skillful manner by the receiver, an experienced man; and that by a continuance of the business the assets will be dissipated and lost to the partners and creditors.

Taking into consideration the fact that the assets were not equal to the liabilities, that the first claim upon

the assets rested with the creditors, and that their right to present their claims at any subsequent stage of the litigation was still existent, we think their interests were proper subject matter for the cognizance of the court in dealing with these assets, notwithstanding they were in no way parties to the record. And, taking all the facts into consideration, we see no excess of power exercised by the trial court in ordering the sale. It must be conceded that the court, by its receiver, had the power to sell perishable property, and, upon the showing here made, this business was clearly property of that character. The assets consisted of articles of trade and the goodwill of the business. The tangible assets were becoming dissipated and lost in spite of care and skill in the management of them, and without these assets the goodwill would seem to be entirely valueless. These two classes of property were indissolubly connected, and, if the court had the power to sell either, it had the power to sell both. Likewise, the book accounts: if any part of these assets could be sold, and it was for the best interests of the copartnership and the creditors that these accounts should go with the business, the court had the power to so adjudge.

A litigious partner, by means incident to litigation, might be able to delay the entry of a decree of dissolution for years, and thereby encompass the utter destruction of the entire partnership assets; and it would seem, in the interest of parties having claims upon these assets, that a court of equity was vested with the right to give relief by converting them into money. But few cases in point have been cited upon either side. In *Crane v. Ford*, 1 Hopk. Ch. 130, the power of the court to sell partnership property *pendente lite* is fully recognized; and in *Marten v. Van Schaick*, 4 Paige, 479, the court said, in speaking of a newspaper partnership: "If a receiver is appointed, he must proceed and sell the establishment without delay, and, in the mean time, the business must be carried on by him as usual, so that the goodwill thereof may be secured to the purchaser,

and the full value of the establishment realized by the partners on such sale. But the court will not take upon itself the responsibility of continuing the publication of a political paper by a receiver any longer than is absolutely necessary to prevent a sacrifice of the property." And again, in *Williams v. Wilson*, 4 Sand. Ch. 380, the court said: "Then, as to the course to be pursued by the receiver, when vested with the goodwill of the concern, it is impossible for him to conduct an insane hospital or a lazaretto for foreign immigrants. The only practical course is for him to sell immediately the lease of the premises where the business was conducted, with the goodwill of the business, and the movables which belong to the institution. And, in order to give efficacy to the sale of the goodwill, either of the parties may become the purchaser." An analogous principle is recognized in *McLane v. Placerville etc. R. R. Co.*, 66 Cal. 629, 630.

In the cases cited the court held itself possessed of the power to sell, by reason of an actual present necessity of sale, in order that the assets might be preserved to the final good fortune of the parties interested therein. There was no more reason for a sale in those cases than in this case. The assets of the present partnership are rapidly depreciating in spite of the exercise of care and skill in their management, and it would appear to be a mere matter of time when they would become wholly lost.

We conclude that the facts in the present case are such that a power of sale in the court *pendente lite* existed.

For the foregoing reasons the orders complained of, made by the trial court, were within its jurisdiction, and they are hereby affirmed.

HARRISON, J., and VAN FLEET, J., concurred.

[No. 15874. Department Two.—November 29, 1895.]

**KATE MORONEY, RESPONDENT, v. W. B. HELLINGS ET AL., APPELLANTS.**

**LANDLORD AND TENANT—FAILURE TO REPAIR—POSSESSION BY TENANT—UNLAWFUL DETAINER.**—Under section 1942 of the Civil Code, a tenant of a dwelling-house who has failed to make necessary repairs or to vacate the premises, and who has remained in possession after rent became due, cannot, in an action of unlawful detainer by the landlord, set up his failure to make the repairs either as a defense to the action or as an offset to the rent.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. **D. J. MURPHY**, Judge.

The facts are stated in the opinion of the court.

*T. M. Osmont*, and *T. J. Crowley*, for Appellants.

*Clement, Cannon, Kline & Stradley*, for Respondent.

**HENSHAW, J.**—Appeal from the judgment. The action is one in unlawful detainer, for the forfeiture of a lease, the recovery of the possession of the demised premises, and for treble rents.

Hellings and his wife were the lessees. Walk was a subtenant, and entered under the Hellings, after the three days' notice to pay or vacate had been served upon them.

The complaint, which is in the usual form, sufficiently pleads plaintiff's cause of action. The answer denied that any sum of money was due as rent, and by way of cross-complaint pleaded that by the indenture of lease it was expressly agreed that all necessary repairs during the term of the letting should be made and the expense therefor borne by plaintiff; that during the time mentioned in the complaint when it was claimed that rent was due and unpaid the water pipes of said premises "became impaired and leaky, and greatly increased the monthly water rate," and caused the tenants occupy-

ing the premises to vacate; and that the plaintiff, after frequent demands, still refused to repair the water pipes or to permit defendants Hellings to do so—all to the damage of the defendants in the sum of two hundred and sixty dollars.

Complaint is made by appellants that the court failed to find upon their allegations as to defective water pipes, their demand that plaintiff make necessary repairs, and plaintiff's refusal to make them, or to permit appellants to do so. But these averments rest upon the claim that it was plaintiff's duty to make these repairs under the lease. The lease was admitted in evidence, and the court properly found that it contained no such covenant, and that plaintiff's obligations as landlord were those only imposed upon her by law.

The bill of exceptions contains all of the evidence admitted in the case and the evidence offered and rejected. By this it appears that no leak was proved to exist. It was merely suspected that one existed because of the size of the monthly water bills. Examination of the pipes had been made by a plumber at the expense of plaintiff, and no leak discovered. The premises were in habitable and tenantable condition. The tenants thought a leak existed, and that it was situated under the sidewalk between the water meter and the house. They wished to tear up the sidewalk to investigate, and plaintiff would not permit them to do so.

There was upon this matter no other rights and duties between the parties than such as arose in law. In the absence of an agreement to the contrary, it was the landlord's duty to repair dilapidations which rendered the premises untenable, and if he did not, then the tenants had the option of making the necessary repairs, not to exceed in cost one month's rent, or to vacate and be discharged from further liability for rent. Even if the landlord refused to allow the lessee to make such repairs, the refusal would be meaningless, and would not and could not modify or destroy the tenant's right under the code. (Civ. Code, sec. 1942.) The failure to find

becomes, therefore, immaterial, since the finding itself, even if in appellants' favor, could not have benefited them.

They neither repaired nor vacated, but remained in possession and claimed damages for the alleged condition of the premises as an offset to the rent. The averments of the cross-complaint become immaterial either in defense or as a cross-complaint, and no findings were necessary upon them (*Dieffendorff v. Hopkins*, 95 Cal. 343), for the rights of the lessees were only those defined by the code. (*Van Every v. Ogg*, 59 Cal. 563; *Sieber v. Blanc*, 76 Cal. 173; *Green v. Redding*, 92 Cal. 548.)

For like reason the evidence rejected by the court was properly rejected, since its admission could not have aided appellants in their defense or cross-complaint. It was therefore rightly excluded as immaterial.

The judgment appealed from is affirmed.

TEMPLE, J., and MCFARLAND, J., concurred.

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[No. 15947. Department Two—November 29, 1895.]

AUGUST LAVER, APPELLANT, v. L. R. ELLERT ET AL., AS COMMISSIONERS COMPOSING THE BOARD OF NEW CITY HALL COMMISSIONERS, RESPONDENTS.

**NEW CITY HALL COMMISSIONERS—MODIFICATION OF PLANS.**—Under the act of March 24, 1876, the present board of new city hall commissioners has the same discretionary powers to modify the plans of the new city hall as that enjoyed by their predecessors under the act of 1870, page 738, and consequently may make deviations from the plans adopted by the commissioners in 1871, under the provisions of the act of 1870; and their action in providing for the construction of a dome, in place of a square clock tower contemplated by the original plans, is not an abuse or in excess of a reasonable exercise of their powers.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. CHARLES W. SLACK, Judge.

The facts are stated in the opinion of the court.

*Gale & Peery, and J. T. Fleming, for Appellant.*

*W. S. Barnes, and Stafford & Stafford, for Respondents.*

THE COURT.—This is an appeal from the judgment entered after demurrer sustained.

It appears from the complaint that the board of new city hall commissioners had entered into a contract with the firm of O'Connell & Lewis for the erection and construction of a dome upon the new city hall in the city and county of San Francisco, in place of a square clock tower contemplated by the original plans. It was averred that the dome, if constructed, would be wholly unlike, in external appearance, the tower which was to be built according to the adopted plans; that it would cost more, and "would be greatly out of harmony with the other parts of said building already completed, and materially detract from its architectural beauty." A perpetual injunction was sought against the defendants to restrain them from proceeding further under the contract, and a judgment was asked decreeing the contract to be null and void. A demurrer was sustained to the complaint upon the ground that it failed to state a cause of action.

The question presented involves the power of the board of new city hall commissioners to make any deviations in the construction of the building from the plans adopted by the commissioners in 1871, under the provisions of the act of 1870. (Stats. 1869-70, p. 738.)

This question, however, has ceased to be of any public importance whatever, and, indeed, of very little concern to the plaintiff himself, by reason of the ratifying act of the last legislature, which, it is conceded, validates the contract, even if, in the first instance, it were improperly entered into by the commissioners. (Stats. 1895, p. 165.)

Nevertheless, we are of opinion that the court properly sustained the demurrer. The act of the legislature creating the new city hall commissioners (Stats. 1870, p. 738) provided that the commissioners should "adopt



such plans for the erection of said city hall as in their judgment best calculated to serve the purposes of said city and county, having in view the necessity of providing a permanent building which will furnish sufficient and suitable rooms to accommodate the different courts and boards of city and county officers, hall of records, and also offices for the various officers of said city and county." The object of the act was to secure the erection of a permanent and suitable building for the purposes named, and the duty enjoined upon the board of adopting plans was to further this object. Nowhere, by the act, was the original board prohibited from changing or modifying the plans, when once adopted, and for the proper performance of the duty imposed upon them it was necessary that some discretion should be left to them in the matter. They should have the power to correct mistakes in plans once adopted. They should have the power to vary an adopted plan, if further investigation satisfied them that the execution of it would not achieve the end in view. Nothing in this act can fairly be said to prohibit the commissioners from changing or modifying plans once adopted, if in the *bona fide* exercise of their judgment they believed the changes or alterations would better meet the objects of the law.

By the act of the legislature approved March 24, 1876, the present board of new city hall commissioners was called into being, and was directed to take charge of the new city hall and improvements therein, "and to proceed with the construction of the building on said premises, known as the new city hall, according to the plans heretofore adopted for a permanent building, as contemplated by an act of the legislature," etc. It is this language which appellant claims deprived the commissioners of any and all discretion, and compels them to proceed with the work under the plans adopted by the former board.

But such a construction is not supported by reason nor borne out by the language of the act itself. It cannot be seen why the successors of the original board

should not have the same discretionary powers which were vested in their predecessors, nor do we find in the terms of the act any express declaration depriving them of that discretion. By section 4 of the act they are empowered to employ an architect. By section 6 it is made the architect's duty to draw specifications of the work to be done, and make drawings therefor. Quite as much room is left for the exercise of discretionary power in the matter of the specifications as in the matter of the original plans, and discretion over the specifications is expressly awarded to the new board; but by section 14 of the act, the right of the board to change adopted plans is expressly recognized. It is there declared "that no change or modification in the place [plan] or specification shall be made after proposals for so doing work or furnishing materials shall be called for."

We conclude that the discretionary powers of the present board, under the act of 1875-76, are not different from those enjoyed by their predecessors, and that the contemplated change was not in abuse or in excess of a reasonable exercise of those powers.

The judgment appealed from is affirmed.

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[L. A. No. 56. Department One.—November 30, 1895.]

**WILLIAM A. WITTE, APPELLANT, v. R. B. TAYLOR,  
RESPONDENT.**

**CONTRACT—COMMISSION ON PURCHASE OF LAND—INDIVISIBLE CONDITION.**

A written contract, by the terms of which the promisor agrees to pay a stipulated commission after the expiration of a certain time from the date of the delivery to him of a deed to an undivided half interest in a particular tract of land, is indivisible, and the promisee does not acquire a *pro tanto* right to the commission upon the delivery to the promisor of a deed for a less interest in the land.

**Id.—PRO TANTO RIGHT TO COMMISSION.**—Conceding that a *pro tanto* right to such commission might result from the conveyance of a less interest in the land to the promisor, such right could not mature until after the expiration of the time limited by the contract for the payment of the stipulated commission.

APPEAL from a judgment of the Superior Court of Riverside County. J. S. NOYES, Judge.

The facts are stated in the opinion of the court.

*H. W. Chynoweth*, for Appellant.

*E. W. Freeman*, for Respondent.

GAROUTTE, J.—This is an action to recover commissions for the sale of certain real estate. A general demurrer was sustained to the complaint, and plaintiff appeals from the judgment rendered thereon. The action is based upon the following clause of a written contract entered into between plaintiff and defendant:

"It is further understood and agreed that when said Taylor can secure from Plez James, of Anaheim, a deed conveying to said Taylor the undivided one-half interest in said ranch now owned by said Plez James in said Nevada ranch, then said Taylor will pay said Witte the sum of \$2,000 as a commission on said purchase and sale from said James; and said Taylor agrees that he will purchase said lots in East Riverside and Hastings from said Witte for the sum of \$1,000, the said purchase from said James to be at terms satisfactory to said Taylor, and the said sums of \$2,000 as commission and \$1,000 for lots to be due and payable at any time after six months from date and delivery of deed from said Plez James for said one-half interest in said ranch to said Taylor."

The complaint sets out the contract, and then alleges that plaintiff used his best efforts to make the sale, and succeeded in obtaining from James an offer to sell said undivided one-half of the ranch to defendant, but that defendant refused to purchase said undivided one-half, but thereupon purchased an undivided one-third from said James upon terms satisfactory to him, defendant. The complaint prays for judgment for the sum of \$1,333.33, that sum being a proportionate amount of the agreed compensation of \$2,000.

The complaint fails to state a cause of action. It is based upon a written contract, and there is no allegation that a compliance has been had with its terms. But, on the contrary, the affirmative allegations show that the main condition precedent to the payment of the commission has never occurred. Again, the commission was not to be paid until six months "from date and delivery of deed from said Plez James for said one-half interest in said ranch to said Taylor." And it is not even claimed that the time above referred to has ever arrived. The action has been brought upon the theory that the contract is separable, and that the commissions *pro tanto* should be paid in proportion to the amount of land purchased by Taylor. The contract does not so provide, and it is not for this court to change its terms. It is not even alleged that the sale of the undivided one-third interest in the ranch was made to Taylor by reason of the labor and influence of plaintiff. But, beyond all that, it is impossible for this court to say that defendant agreed to, or was even willing to, pay any commission whatever for the purchase of an undivided one-third interest in the ranch. We think the contract is indivisible in this regard, and must stand or fall as a whole.

For the foregoing reasons the judgment is affirmed.

HARRISON, J., and VAN FLEET, J., concurred.

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[S. F. No. 119. In Bank.—November 30, 1895.]

IN THE MATTER OF THE ESTATE OF THOMAS H. BLYTHE, DECEASED. FLORENCE BLYTHE, PLAINTIFF, *v.* ABBIE AYRES ET AL., DEFENDANTS. HENRY T. BLYTHE ET AL., APPELLANTS.

ESTATES OF DECEASED PERSONS—PROCEEDING TO DETERMINE HEIRSHIP—ENTRY OF FINAL DECREE.—The final order or decree, in a proceeding under section 1664 of the Code of Civil Procedure to determine heirship, is properly entered when spread at length upon the minute-book of the court in probate. It is not necessary that it should be entered in a judgment-book.

APPEAL from an order of the Superior Court of the City and County of San Francisco refusing to dismiss a proceeding to determine heirship. J. V. COFFEY, Judge.

The facts are stated in the opinion of the court.

S. W. & E. B. Holladay, for Appellants H. T. Blythe *et al.*

W. H. H. Hart, and Garber, Boalt & Bishop, for Respondent.

HENSHAW, J.—Appellant, Henry T. Blythe, and others moved the court sitting in the matter of said estate to dismiss the above-entitled proceeding, upon the ground that the party entitled to judgment therein had neglected to demand and have the same entered for more than six months. (Code Civ. Proc., sec. 581, subd. 6.) His motion being denied this appeal is taken.

The facts are that in the proceeding had under section 1664 of the Code of Civil Procedure in the matter of said estate, the order or decree of the court determining heirship and rights to property was, upon October 22, 1890, spread at length upon the probate minute-book as required by section 1704 of the Code of Civil Procedure.

Appellant prosecuted his appeal from this decree, basing it, as appears from the transcript therein filed, upon the entry thereof made in the minute-book. That appeal having been decided adversely to his contention, he makes this motion to dismiss all proceedings taken under said section 1664 for the neglect of respondent, but lately discovered, in failing to have the decree or judgment from which he appealed entered in the proper book.

To support the contention the claim is made that the proceeding under section 1664 of the Code of Civil Procedure is a civil action; that the final determination of a civil action is a judgment; that a judgment must be entered in a judgment-book (Code Civ. Proc., sec. 668); that this judgment admittedly was not so entered; and that the penalty for the omission should be a dismissal.

But the proceeding under section 1664 of the Code of Civil Procedure, while partaking in form of the nature of a civil action, is not a civil action, and the final determination, while having features in common with a judgment, is not a judgment in a civil action. It is unnecessary to discuss the nature and scope of this proceeding, for that has already been elaborately done in this estate in *Blythe v. Ayres*, 102 Cal. 254, 258, as well as in the case of *In re Burton*, 93 Cal. 463, where it is said: "The proceeding permitted by section 1664 of the Code of Civil Procedure is a special proceeding (*Smith v. Westerfield*, 88 Cal. 374), and is embraced within the scope of 'matter in probate' as clearly as is the proceeding for the sale of real property to pay debts of an estate."

Moreover, the very contention raised upon this appeal has twice before been presented in motions made by parties to the original proceeding, and both times decided against the contention. In *Blythe v. Ayres*, No. 15479, the record showed the entry of the decree appealed from in the probate minute-book, and a motion was made to recall the *remittitur* as having been improvidently issued upon the ground that the record disclosed that no entry of the judgment appealed from had been made, the point being that the entry should have been in the judgment-book. And in *Blythe v. Ayres*, No. 15788, the motion was made after suggestion of a diminution of the record, for that it did not disclose an entry of the judgment, and the entry shown to have been made in the minute-book was not sufficient. In denying these motions, since consent could not confer jurisdiction, it was of necessity held that the final decree, when spread at length upon the minute book of the court in probate, was properly entered.

The order appealed from is affirmed.

MCFARLAND, J., VAN FLEET, J., GAROUTTE, J., and TEMPLE, J., concurred.

[S. F. No. 98. In Bank.—November 30, 1896.]

IN THE MATTER OF THE ESTATE OF THOMAS H. BLYTHE, DECEASED. HENRY T. BLYTHE ET AL., APPELLANTS.

**ESTATES OF DECEASED PERSONS—PROCEEDING TO DETERMINE HEIRSHIP—ENTRY OF FINAL DECREE.**—The final order or decree, in a proceeding under section 1664 of the Code of Civil Procedure to determine heirship, is properly entered when spread at length upon the minute-book of the court in probate. It is not necessary that it should be entered in a judgment-book.

**APPEAL** from a decree of the Superior Court of the City and County of San Francisco distributing the estate of a deceased person, and from an order refusing a new trial. J. V. COFFEY, Judge.

The facts are stated in the opinion of the court.

S. W. & E. B. Holladay, for Appellant Henry T. Blythe *et al.*

W. H. H. Hart, and Garber, Boalt & Bishop, for Respondent.

**HENSHAW, J.**—This is an appeal by Henry T. Blythe and others from the decree of distribution in the matter of the above-entitled estate.

The petition for distribution was presented by Florence Blythe. She averred, as the foundation of her claim, the decision and judgment made in the matter of said estate in the proceeding entitled *Florence Blythe v. Abbie Ayres et al.* The appellants appeared, joined issue with the petitioner, and pleaded *nul tiel record*.

Upon the hearing the decision of the court, as entered in the probate minute-book upon October 22, 1890, was offered and admitted in evidence over the objection of appellants. Appellants, in turn, "offered and demanded that they be permitted to prove that no such judgment existed against them as is alleged against them in the said petition for distribution, because the said

judgment (rendered October 22, 1890, in the action or proceeding of *Florence Blythe v. Abbie Ayres et al.*) had never been entered in the judgment-book; the time to appeal from said judgment had never arrived; the said judgment had never been entered; the action or proceeding was still pending; the alleged appeal taken by Henry T. Blythe *et al.*, as from said judgment, was taken by inadvertence, under the impression that said judgment had been entered, and without the knowledge of said parties or their attorneys of the nonentry of said judgment; that said Henry T. Blythe *et al.* were parties defendant in said action or proceeding and were making a *bona fide* claim to the heirship and ownership of said estate; that said alleged appeal of Henry T. Blythe *et al.*, as from said judgment, was futile; that the action of the supreme court, as in affirming said judgment, was without jurisdiction and void; that its *remittitur* to the superior court certifying its said action was void; that said *remittitur* was never attached to the judgment-roll, and no minute of said affirmance of the supreme court was ever entered on the docket of said superior court." The court sustained the objection of petitioner to this offer. The offer, it will be observed, was to show that the alleged judgment did not exist *because* it had never been entered in the judgment-book. No claim was made by petitioner that it had been so entered. Indeed, petitioner rested her cause upon the affirmative showing that entry had been made in the minute-book.

That this entry was sufficient has thrice been decided in the matter of this estate. (*Blythe v. Ayres*, *ante*, p. 227.) There was thus before the court an affirmative showing of a sufficient entry. For appellants to have proved that it was not entered in some other book could not have advantaged them, and the refusal of the court to allow them to make such proof could not have injured them.

The decree and order appealed from are affirmed.

The order of this court, made upon application of



appellants herein restraining the probate court from proceeding further in the matter of the distribution of said estate, is also vacated and dissolved.

McFARLAND, J., VAN FLEET, J., GAROUTTE, J., and TEMPLE, J., concurred.

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[S. F. No. 207. In Bank.—November 30, 1895.]

ESTATE OF THOMAS H. BLYTHE, DECEASED. SARAH DAVIS, APPELLANT, *v.* FLORENCE BLYTHE HINCKLEY ET AL., RESPONDENTS.

ESTATES OF DECEASED PERSONS—DETERMINATION OF HEIRSHIP—PROCEEDING IN REM—CONSTRUCTION OF CODE.—It seems that the proceeding and decree provided for in section 1664 of the Code of Civil Procedure were intended by the legislature to be *in rem*, and conclusive against all persons, and the unquestioned basis for the decree of distribution which was to follow.

ID.—DECREE OF DISTRIBUTION—CONTEST BY CLAIMANT—ADMISSIBILITY OF PROCEEDINGS TO DETERMINE HEIRSHIP.—Where an heir who has instituted prior proceedings under section 1664 of the Code of Civil Procedure petitions for a subsequent distribution of the property, and sets forth the proceedings as a basis for the decree, if a claimant who did not appear, and was not named in such proceedings, appears and contests the distribution, and joins issue upon the fact of such proceedings, the proceedings are admissible in evidence under the issues, in proof of the averments denied by the contesting claimant, without regard to the question of their conclusiveness.

ID.—KINSHIP OF CLAIMANT—CONCLUSIVENESS OF FINDING.—Where the finding of the superior court is against the kinship of the contesting claimant to the decedent, and to the effect that she has no interest in the estate, and the testimony in favor of the claimant is of an exceedingly slight and flimsy character, the conclusion of the trial judge will not be disturbed upon appeal, but it will be considered that she has no interest in the estate, and is not concerned with its distribution.

APPEAL from a decree of distribution in the Superior Court of the City and County of San Francisco. J. V. COFFEY, Judge.

The facts are stated in the opinion of the court.

*Timothy J. Lyons, John H. Durst, and James Alva Watt, for Appellant.*

*William H. H. Hart, and T. I. Bergin, for Respondent Florence Blythe Hinckley.*

MCFARLAND, J.—This is an appeal by Sarah Davis from a decree of distribution to Florence Blythe Hinckley of the property and estate of Thomas H. Blythe, deceased.

The said Blythe died intestate in April, 1883. Letters of administration upon his estate were issued in that year to Philip A. Roach, who was afterward succeeded by others as administrators. More than one year after the issuance of letters the respondent herein, Florence Blythe Hinckley, then Florence Blythe, commenced proceedings, under section 1664 of the Code of Civil Procedure, to have the claims of all persons to said estate, and its distribution, ascertained and declared in the manner provided by that section. She filed her petition in October, 1885, claiming to be the daughter and sole heir of said deceased, and entitled to the distribution of his whole estate. The court duly made an order requiring all persons, named or unnamed, to appear on February 1, 1886, and exhibit their claims of heirship, ownership, or interest in said estate, which was duly published; and on said day nearly two hundred persons appeared claiming such heirship. Within the time prescribed by law said Florence filed her complaint, setting forth the facts constituting her heirship to the deceased and her claim to said estate; and the numerous persons who had appeared filed pleadings, or "answers," as they are called in the section, setting up the facts constituting their claims to heirship and distribution. They are mostly associated in certain groups, and their claims were mostly inconsistent with and hostile to each other, each group contending that the deceased was descended from parents different from those alleged by either of the other claimants. After various proceedings not

necessary to be mentioned here, and after a full hearing and trial, the court, in October, 1890, made its decision, and entered its decree or judgment, by which it was adjudged and decreed that the said Florence was the daughter of said deceased, and his sole heir, and therefore entitled to the distribution of the whole of said estate, and that neither of the said persons appearing as aforesaid, nor any other person, was heir to said deceased or entitled to any of said estate. From this judgment various appeals were taken, but, upon all the appeals, the judgment was affirmed. (See *Blythe v. Ayres*, 102 Cal. 254; also eight other cases there mentioned; *Blythe v. Ayres*, 96 Cal. 532; *Hinckley v. Ayres*, 105 Cal. 357.) Two of the persons who appeared and answered and took appeals, as above stated, were William Savage and his brother, David Savage; and these two were brothers of the appellant, Sarah Davis. These two brothers, during the above-mentioned proceedings, presented and contested for the claim of the group called the "London Savages"; and this appellant, although she knew that this claim, in which she was interested jointly with her brothers, was thus being litigated, and gave testimony, by a deposition, for her brothers in support of that claim, did not appear as a party; and she now claims the right to open up and again contest for the said alleged London Savage heirship, and to disregard all the proceedings and decisions above mentioned—which after full and protracted litigation resulted in the judicial determination of all said conflicting claims in favor of said Florence—upon the ground that there was no legal service upon appellant of the notice of said proceeding, because she was not individually named in said notice or in an affidavit for publication. Of course, under these circumstances, she is entitled to no equitable consideration, and must stand upon her strict legal rights, if any such she has.

The contention of appellant is, that the said proceedings and decree under section 1664 (styled "*Blythe v. Ayres*") are not conclusive as against her. But that

question does not necessarily arise in this case. Considering the state of the law before the enactment of section 1664, the character of the remedy which that section was intended to provide is quite apparent. It was intended to construct a wider, better, and more just and effective method of determining heirship to one dying intestate, where there are many conflicting claimants of such heirship. It gives a longer time, and affords ampler opportunities to contestants to present and litigate their claims, than they formerly had when the ordinary decree of distribution was conclusive; and we have no doubt that the legislature intended by said section to make the decree under it conclusive against all persons, and the unquestioned basis for the decree of distribution which was to follow. And this, of course, the legislature could do in a proceeding *in rem*, such as the one under discussion. But we are not called upon in this case to determine definitely whether or not the somewhat bungling language of the section has in any material way obscured what was apparently the legislative intent.

In the case at bar, the question arises upon the objections by appellant to the introduction by the respondent of the prior proceedings in the administration of the estate of Thomas H. Blythe, including the proceedings under said section 1664 and the judgment and decree rendered therein. These proceedings were properly set forth by respondent in her petition for distribution; and they were all specifically denied by the appellant in her answer to said petition. If there is any one of the averments of the petition—from the death of Blythe to the moment when the answer was filed—that is not denied by the answer, we have failed to discover it. The English language seems to have been tortured in the answer through apparent fear that the denials might not be considered comprehensive and complete. She denies that any proceeding was taken under section 1664, or that any person appeared and filed an answer therein, or that any judgment was rendered, or any

appeal taken by anyone. The following are some specimens of said denials: "The said Sarah Davis denies that said or any decision so duly or otherwise given or made, or as aforesaid or otherwise or at all, was in the words or figures following, to wit, as set forth in the said petition, or otherwise or at all." "The said Sarah Davis denies that said or any judgment so or otherwise duly or otherwise given or made or entered or otherwise as aforesaid or otherwise or at all was or is in words or figures following, to wit, as set forth in the said petition, or otherwise or at all." "The said Sarah Davis denies that the said or any judgment still remains in full or any force or effect or otherwise or at all, or has not been in anywise reversed or vacated or annulled, or that certain or any of the aforesaid parties, or any party who appeared as above stated or otherwise, in said cause or any cause, or at all, or who appeared upon the or any trial of said or any cause as above or otherwise stated, or at all, appealed from said or any judgment to the supreme or any court of said or any state of California, or otherwise or at all," etc; and it is denied in similar verbiage that "the supreme court, or any court or otherwise or at all," rendered judgment on said appeals.

It is quite apparent, therefore, that the said evidence objected to was properly introduced in proof of averments denied by the appellant and necessary to respondent's application for distribution.

Moreover, the evidence objected to was admissible, generally, as proof of respondent's *status* as sole heir of the deceased. Whether it would be *conclusive* as against appellant, or whether it would have been evidence at all against her on the question of the *status* of respondent, if appellant were "interested in the estate," is, as before stated, not a necessary question here. Upon the issue of her interest in the estate the court below allowed her to introduce all the evidence she had to offer; and it found that she is in no manner akin to said Blythe, deceased, and has no interest in or claim to any of his estate. It is contended that the finding is against the

evidence, and that we ought to say here that, upon the testimony introduced by appellant, the court below should have found that she *is* akin to the deceased, and *has* an interest in his estate. But the testimony on that point was of an exceedingly slight and flimsy character; and we would be without warrant in disturbing the conclusion of the trial judge on this question of fact. (See *Blankman v. Vallejo*, 15 Cal. 646; *Mogk v. Peterson*, 75 Cal. 501; *Baker v. Firemen's etc. Ins. Co.*, 79 Cal. 41; *Elwood v. Western Union Tel. Co.*, 45 N. Y. 553; *Sipple v. State*, 99 N. Y. 289.) Therefore, as the appellant has no interest in the estate, she is not concerned with its distribution.

There are no other points in the case necessary to be noticed.

The judgment and decree of distribution appealed from are affirmed.

HENSHAW, J., VAN FLEET, J., and GAROUTTE, J., concurred.

BEATTY, C. J., and HARRISON, J., deeming themselves disqualified, took no part in the decision of this cause.

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[L. A. No. 30. Department One.—November 30, 1896.]

A. P. YEARSLEY, APPELLANT, v. SUNSET TELEPHONE AND TELEGRAPH COMPANY, RESPONDENT.

MASTER AND SERVANT—NEGLIGENCE—TELEPHONE LINEMAN.—A lineman of a telephone company, who, while engaged in stringing a line of wire upon certain telephone poles, voluntarily climbs a tree to arrange the wire, and while so employed is injured by the breaking of the limb upon which he was standing, cannot recover for the injury from the company.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial. W. H. CLARK, Judge.

The facts are stated in the opinion of the court.

*McComas & Schutze*, for Appellant.

*Graff & Latham*, for Respondent.

GAROUTTE, J.—Plaintiff brought an action against defendant to recover damages for personal injuries received by him while in his employ. He was nonsuited, moved for a new trial, and now appeals from the judgment, and also from the order denying his motion.

The facts may be briefly stated as follows: Plaintiff was a lineman of defendant, a telephone and telegraph company, and was ordered by defendant to string a line of wire upon certain telephone poles. A pepper tree, situated upon private land and between two of these poles, was to some extent an obstruction in stringing the wire. Thereupon plaintiff climbed the tree, and, while engaged in arranging the wire, the limb upon which he was standing gave way, and he was precipitated to the ground with serious injury to himself.

The judgment of nonsuit was properly granted, as we fail to discover by the record any evidence of negligence upon the part of the defendant. Appellant's argument goes to the extent that defendant was guilty of negligence in furnishing defective appliances to be used in stringing the wires. But it cannot be claimed that this pepper tree was an appliance furnished by defendant. It belonged to a stranger, and was upon private property. Even conceding it an appliance, and a defective one, it was one of plaintiff's own choosing, and he must bear the burdens resulting from a bad exercise of judgment upon his part. Let us suppose plaintiff had fallen from a defective fence encountered in the line of his duty while stringing this wire, and had suffered injuries; would defendant be liable? Or let us assume that he had undertaken to swim a stream while in the line of his duty, and had been drowned; would there be a liability against defendant? We fail to discover it. Plaintiff was ordered to do certain work, namely, string wires. He was furnished the poles upon which to string them.

Without demanding further appliances of any kind, or informing defendant that others were needed, he proceeded with the work, and while so engaged called to his aid additional appliances of his own selection. He stands in the same position as though he had chosen for his use a frail plank or a rickety ladder, rather than a pepper tree.

As to the comparative knowledge of plaintiff and defendant, pertaining to the defects in the tree and the dangers arising from its use as an appliance, we pass the subject without consideration.

For the foregoing reasons the judgment and order are affirmed.

HARRISON, J., and VAN FLEET, J., concurred.

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[No. 18302. In Bank.—December 2, 1895.]

ELIZA YORE ET AL., RESPONDENTS, v. A. G. BOOTH, RECEIVER, APPELLANT.

**LIFE INSURANCE—POLICY PAYABLE TO LEGAL HEIRS—POWER TO CHANGE BENEFICIARIES.**—A person who procures a policy upon his life payable to a designated beneficiary, although he pays the premiums himself and keeps the policy in his exclusive possession, has no power to change the beneficiary unless the policy itself or the charter of the insurance company so provides; and this doctrine is applicable to a case in which the designated beneficiaries are the legal heirs of the person effecting the insurance.

**ID.—RIGHTS OF BENEFICIARIES—VESTED INTEREST.**—A beneficiary named or described in the policy of life insurance, although parting with nothing and simply the object of another's bounty, has a vested and irrevocable interest in the policy, which he may keep alive for his own benefit by paying the premiums or assessments, if the person who effected the insurance fails or refuses to do so.

**ID.—ACTION UPON POLICY—DECLARATIONS OF DECEASED—HEARSAY.**—In an action upon a policy of insurance, brought by the beneficiaries, after the death of the insured person, any declarations of the deceased, not made at the time of procuring the policy, or as part of the *res gestae*, are hearsay and incompetent evidence.

**ID.—STATEMENT AS TO AGE—PRESUMPTION—CONFLICTING STATEMENT.**—A statement in the application for the policy as to the age of the insured is presumed to be true; and any different or contradictory statement as to his age in applications for other policies, or at other times, are hearsay, and cannot overcome such presumption.



**ID.—APPLICATION FOR ANOTHER POLICY—SIGNATURE FOR WIDOW.**—An application for a different policy from the one in suit, signed by the husband, in the name of the widow, and not by her in person, although it would be competent evidence against her in an action upon the policy issued thereon, is not competent evidence in favor of another insurance company sued upon the policy in controversy, to show a different statement of the age of the insured, in the absence of proof that she was actually cognizant of the facts and statements made in the other policy.

**APPEAL** from a judgment of the Superior Court of the County of Yuba and from an order denying a new trial. E. A. DAVIS, Judge.

The facts are stated in the opinion of the court.

*Van Ness & Redman*, for Appellant.

The declarations of the deceased were competent evidence against the heirs, who had no vested interest until the death of the insured. (*Steinhausen v. P. M. A. Assn.*, 13 N. Y. Supp. 36; *Smith v. Society*, 4 N. Y. Supp. 521; *Mahaney v. M. R. F. Life Assn.*, 23 N. Y. Supp. 213.) Where there is a vested interest, declarations made prior to the issuance of the policy are admissible. (*Swift v. Massachusetts etc. Life Ins. Co.*, 63 N. Y. 186; Code Civ. Proc., sec. 1851.) The widow's acceptance of the Pacific Mutual policy made the statements therein admissible against her. (*New York Life Ins. Co. v. Fletcher*, 117 U. S. 519; *Richardson v. Maine Ins. Co.*, 46 Me. 394; 74 Am. Dec. 459.) Whether the statements contained in the application in suit be considered as warranties or representations, if they are in any respect untrue, there can be no recovery. (*Jeffries v. Mutual Life Ins. Co.*, 22 Wall. 47.)

*Forbes & Dinsmore*, and *Mastick, Belcher & Mastick*, for Respondents.

The declarations of Peter Yore as to his age were not competent evidence against plaintiffs. (*Union Cent. Life Ins. Co. v. Cheever*, 36 Ohio St. 201; *Washington Life Ins. Co. v. Haney*, 10 Kan. 525; *Mobile Life Ins. Co. v. Morris*, 3 Lea, 101; 31 Am. Rep. 631; *Rawls v. Ameri-*

*can etc. Ins. Co.*, 27 N. Y. 282; 84 Am. Dec. 280; *McGinley v. United States Life Ins. Co.*, 8 Daly, 390; *Fraternal etc. Life Ins. Co. v. Appelgate*, 7 Ohio St. 292; *Demings v. Supreme Lodge*, 14 N. Y. Supp. 834; *Dial v. Valley Mut. Life Assn.*, 29 S. C. 560.) The interests of the wife and children were vested. (Civ. Code, sec. 694.)

BEATTY, C. J.—This is an action by the widow and children of Peter Yore, deceased, to recover the amount of a policy on his life issued May 10, 1886, by the Bankers' and Merchants' Mutual Life Insurance Association, and made payable to his "legal heirs." The defendant is receiver of said association, and is appealing from a judgment in favor of the plaintiffs, and from an order denying his motion for a new trial.

The policy in question was issued upon a written application made by Peter Yore, and the action is defended upon the ground that in his application he stated that he was only fifty-six years of age when in fact he was older. At the trial the defendant, in order to prove the falsity of the statement as to age, offered in evidence: 1. An application made by the deceased to the Pacific Mutual Life Insurance Company in 1868 in which he stated that he was born in 1825; 2. A statement made in 1878 in an application to the Mutual Life Insurance Company of New York that he was born in 1829; 3. An entry on the great register of Sierra county made in 1879 showing that he was born in 1822. All this evidence was rejected upon the ground of incompetency.

I was at first inclined to regard this ruling as erroneous, but an examination of a large number of cases has convinced me that it is sustained at all points by the decided weight of authority. It seems to be the settled doctrine, with but slight dissent in the courts of this country, that a person who procures a policy upon his own life, payable to a designated beneficiary, although he pays the premiums himself, and keeps the policy in

his exclusive possession, has no power to change the beneficiary, unless the policy itself, or the charter of the insurance company, so provides. In other words, it is held that the beneficiary named in the policy, although he has parted with nothing, and is simply the object of another's bounty, has acquired a vested and irrevocable interest in the policy, which he may keep alive for his own benefit by paying the premiums or assessments if the person who effected the insurance fails or refuses to do so.

It is contended, however, that this doctrine is inapplicable to a case in which the designated beneficiaries are the "*legal heirs*" of the person effecting the insurance, because a living person has no heirs, and, therefore, it is argued no interest can vest in any one during his lifetime.

But this would seem to be a very technical ground for making a distinction in the application of a doctrine which, if it is a sound and wholesome one, ought to protect these plaintiffs, and others in like situation, as completely as if they had been named. It appears that when Peter Yore applied for his insurance he had a wife and a number of children living. If he had designated them by name, or the survivors of them, as his beneficiaries, and had added a proviso that any after-born child should come in for an equal share, we can see no reason why such designation would not have been effectual, and this, in legal effect, is what he did. If, in the case supposed, an interest in the policy would have vested in the named beneficiaries, as we think it would, the same interest vested in these plaintiffs on the issuance of a policy, and it was not in the power of Peter Yore thereafter to change the beneficiaries or revoke his benefaction. This precise point was so ruled in *Weisert v. Muehl*, 81 Ky. 336, and we have not been referred to any case holding the contrary.

From this it follows that, as to these plaintiffs, any declarations of the deceased, not made at the time of procuring the policy, or as part of the *res gestae*, were

hearsay and incompetent. The authorities in support of this proposition are numerous, and need not be cited here.

It is, however, claimed that the application to the Pacific Mutual should have been admitted, because it was signed by Eliza Yore (the widow). But her name was so signed by her husband, and not by her in person. Undoubtedly, the statements made in that application would have been competent evidence against her in an action upon the policy issued thereon, but, in favor of a stranger, they are not evidence without proof that she was actually cognizant of them, and there was no such proof in this case.

The proof of death furnished by one of these plaintiffs was admitted in evidence, and contained a statement that the deceased was born in 1829. Appellant contends that, in the absence of any explanation or rebuttal, the court could not, in the face of this evidence, avoid finding that the statement of deceased that he was born in 1830 was false. We do not think, however, that this statement in the proof of death, wholly immaterial as it was, and evidently hearsay, was of such weight and cogency as necessarily to overcome the presumption in favor of the truth of the statement upon which the policy was issued. In view of these conclusions, the other points discussed by counsel became immaterial.

The judgment and order appealed from are affirmed.

McFARLAND, J., GAROUTTE, J., HARRISON, J., TEMPLE, J., and HENSHAW, J., concurred.

Mr. Justice VAN FLEET, deeming himself disqualified, did not participate in the foregoing.

[L. A. No. 49. Department One.—December 3, 1895.]

**W. P. GIBSON AND N. P. ALEXANDER, COPART-  
NERS, ETC., RESPONDENTS, v. ELLA A. WHEELER,  
APPELLANT.**

**MECHANIC'S LIEN—CLAIM OF MATERIALMAN—PLEADING—VARIANCE.—**

In an action to foreclose the lien of a materialman, in which the complaint alleges that a balance of the contract price is still in the hands of the owner of the building, and bases a right of recovery upon that ground only, the plaintiff cannot recover upon proof of the mere assumption by the owner of a debt of the contractor, or his agreement to pay such debt, which would not carry or create a right of lien, and which is not alleged in the complaint, and there can be no recovery against the owner, where the court finds as a fact that he had paid out more than the contract price of the building prior to the commencement of the action, and owed the contractor nothing.

**ID.—MATERIALS FURNISHED TO OWNER NOT PLEADED—FINDING OUTSIDE OF ISSUES.**—Where the complaint alleges only that materials were furnished to the contractor, the court cannot enforce a lien against the owner upon proof that materials were bought by the owner directly from the plaintiffs, and were used in the construction of the building, nor adjudge the recovery of a lien for the amount of materials thus bought; and a finding of any contract with the owner not pleaded is outside of the issues made.

**APPEAL from a judgment of the Superior Court of  
Los Angeles County. J. W. MCKINLEY, Judge.**

The facts are stated in the opinion of the court.

*W. R. Bacon, and M. K. Young, for Appellant.*

Findings outside of the issues are idle and useless, and cannot support the judgment. (*Morenhout v. Barron*, 42 Cal. 591; *Devoe v. Devoe*, 51 Cal. 543; *Mondran v. Goux*, 51 Cal. 151; *Green v. Covillaud*, 10 Cal. 332; 70 Am. Dec. 725; *Murdock v. Clarke*, 59 Cal. 683; *Clay v. Walton*, 9 Cal. 328.) A materialman has no lien, except to the extent of the contract price. (*Bowen v. Aubrey*, 22 Cal. 571; *McAlpin v. Duncan*, 16 Cal. 127; *Turner v. Strenzel*, 70 Cal. 28; *Wiggins v. Bridge*, 70 Cal. 437; *Sidlinger v. Kerkow*, 82 Cal. 42; *Kerckhoff-Cuzner etc. Co. v. Cummings*, 86 Cal. 27.)

*R. B. Treat, and C. K. Holloway, for Respondents.*

The promise of appellant to pay for the materials raised an original and absolute liability. (*Parker v. Heaton*, 55 Ind. 1; *Hedges v. Strong*, 3 Or. 18; *Booth v. Eighmie*, 60 N. Y. 238; 19 Am. Rep. 171; *Watson v. Jacobs*, 29 Vt. 169.)

GAROUTTE, J.—This is an action to foreclose a materialman's lien. The owner of the property, Wheeler, and Tetro, the contractor, are joined as defendants. Plaintiff recovered judgment in the sum of one hundred and twenty-two dollars and seventy-three cents, which sum was adjudged a lien upon the property, and defendant Wheeler now appeals upon the judgment-roll without a bill of exceptions. The *status* and rights of the contractor are not here involved. The main contention of appellant is that a fatal variance exists between the allegations of the complaint, and the findings of fact made by the trial court. The complaint alleges that a certain balance of the contract price, which was seven hundred and sixty-eight dollars, is still in the hands of the defendant Wheeler, and bases a right of recovery upon that ground. It not being necessary to record the contract, owing to the fact that the contract price was less than one thousand dollars, it would seem that no recovery could be had under any other theory than the one suggested. To be sure, we find an allegation in the complaint that "A. Tetro, as the agent and contractor for the owner, Ella A. Wheeler, entered into a contract with the plaintiffs, by which said plaintiffs agreed to furnish material, etc.," but there is no allegation anywhere that Wheeler agreed to pay for this material under any such contract or any contract; and it is quite apparent upon the face of the statement itself, and even more apparent when we consider the pleading as a whole, that such allegation is not, and was not intended by the pleader as an allegation that the contractor bought this material acting as the agent of the owner, Wheeler; but it is evident that the statement is

made in the sense of the term "agent," as used in section 1183 of the Civil Code; and such was the construction given a similar allegation of a pleading by this court in *Benton v. Conley*, 49 Cal. 185.

The court found as a fact that defendant Wheeler had paid out more than the contract price of the building prior to the commencement of this action, and owed the contractor nothing. As a general rule of law, in a case like the one at bar, this finding of fact would defeat plaintiff's right of recovery against Wheeler, but it is claimed that certain other findings of fact made by the trial court support the judgment, and to those our attention will now be addressed. The court found that when plaintiffs had furnished material to the contractor to the value of one hundred and four dollars, and which material was used in the construction of the building, Wheeler requested plaintiffs to furnish no further material, as the contract price had been exhausted, and then and there agreed to pay plaintiffs for the material so furnished, to the amount of one hundred and four dollars, and no more. Standing alone, there is no comfort for respondents to be derived from this finding of fact, and it is doubly objectionable when viewed in the light of the complaint. Even if the complaint was broad enough to justify this finding, still an agreement by the owner of the building to pay a present existing indebtedness could never furnish material sufficient to base a charge of mechanic's lien upon the building. There are cases named in the statute where materials are deemed to have been furnished at the instance and request of the owner, and charges of lien so created, but there an entirely different principle is involved. We know of no case where an assumption of a debt, or an agreement to pay a debt, by the owner, will carry or create a right of lien. Again, no such contract is sued upon in the complaint. The contract there relied upon for recovery is one made by the contractor with plaintiffs prior to the furnishing of the material. The contract found upon by the court is one made by the owner

with plaintiffs, and made after the materials were furnished, and used in the construction of the building. As to the binding force and effect of this promise made by Wheeler to pay the sum of one hundred and four dollars (by reason of its being oral and probably without consideration), we refrain from deciding. We also conclude by reason of variance between the complaint and the finding, which we have already noticed, that plaintiffs are not entitled to a personal judgment for this amount.

The court made a finding to the effect that, subsequent to the agreement referred to in the above-mentioned finding, defendant Wheeler bought certain materials from plaintiffs upon her own account to the amount of eighteen dollars and thirty-three cents, to be used, and which were used, in the construction of the building, and a recovery and lien is also adjudged for this amount. But, as we have seen, the complaint proceeded upon no such theory. No such contract, or any contract with defendant, is alleged therein, and the finding is without, and not justified by, the issues made. Certainly, upon a judgment-roll containing no bill of exceptions, plaintiffs' cause of action cannot be better proved than stated.

For the foregoing reasons the judgment is reversed and the cause remanded.

**HARRISON, J., and VAN FLEET, J., concurred.**



[No. 18365. Department One.—December 3, 1895.]

S. H. RICE, APPELLANT, v. TRINITY COUNTY,  
RESPONDENT.

COUNTY BOUNDARY—SURVEY UNDER DIRECTION OF SURVEYOR GENERAL—

LIABILITY OF COUNTY.—Where a survey of a county boundary is made by a surveyor authorized by the surveyor general to make it, and is officially sanctioned and approved by the surveyor general, the survey becomes his act, and is made by the surveyor general within the meaning of sections 483 and 3969 of the Political Code, although the surveyor making the survey is not a deputy surveyor general; and each of the counties adjoining upon the boundary is liable to the surveyor appointed by the surveyor general for its proportionate share of the cost of surveying and definitely marking out the boundary line.

ID.—AUTHORITY OF SURVEYOR GENERAL—AGENCY FOR STATE—DELEGATION OF MECHANICAL AND FIELD WORK.—The law, in casting upon the surveyor general the duty of making public surveys, clothes him with the requisite power to enable him to perform that duty, and it is competent for him to employ surveyors and other functionaries usual and necessary in running the lines and doing the detail work required, and he is the agent of the state for the making of such surveys, and may delegate the mechanical part of the work to others, nor is it necessary that the field work should be done by or under the direct supervision of a deputy.

APPEAL from a judgment of the Superior Court of Trinity County. T. E. JONES, Judge.

The facts are stated in the opinion of the court.

*Thomas S. Bond*, for Appellant.

An agent may delegate his power when the act to be done is purely mechanical, or according to usage. (Civ. Code, sec. 2349; *Sayre v. Nichols*, 7 Cal. 535, 542; 68 Am. Dec. 280.) The county is liable for its proportionate share of the costs of the survey. (Pol. Code, sec. 3974.) The surveyor general could not bring the action, since he is limited to the recovery of his salary. (Pol. Code, sec. 484.) A public officer is not personally liable where he acts as agent of the state. (Wharton's Commentaries on Agency and Agents, sec. 513; *Dwinelle v. Henriquez*, 1 Cal. 392; 2 Kent's Commentaries, 632; 1 Parson's Contracts, 7th ed., side p. 124, bottom p. 138.)

Usage may form a basis for recovery. (*Moon v. Guardians of Whitney Union*, 3 Bing. N. C. 814; *Ledoux v. Goza*, 4 La. Ann. 160.) The action is properly brought in the name of the plaintiff as the real party in interest. (Code Civ. Proc., secs. 367, 369; *Western Development Co. v. Emery*, 61 Cal. 614; *Mendocino County v. Lamar*, 30 Cal. 629; *Mendocino County v. Morris*, 32 Cal. 148; Bliss on Code Pleading, sec. 58.)

*James W. Bartlett, District Attorney, for Respondent.*

The plaintiff is not a deputy surveyor general and there is no cause of action. (*May v. Hanson*, 6 Cal. 642; *Wakeham v. Barker*, 82 Cal. 50; *White v. Merrill*, 82 Cal. 14; *McCarthy v. Loupe*, 62 Cal. 300; *People v. Crowey*, 56 Cal. 39; *Thompson v. Felton*, 54 Cal. 547.) A surveyor general is required to mark out the boundary lines of counties. (Pol. Code, sec. 483, subd. 2, secs. 3969, 3971.) The county surveyor may be required to assist the surveyor general. (Pol. Code, sec. 4274; County Government Act, sec. 144.)

THE COURT.—The plaintiff brought this action to recover from the defendant its proportionate share of the cost of surveying and definitely marking out the boundary line between the counties of Humboldt and Trinity on the one side and the county of Mendocino on the other side. The defendant demurred to the complaint on various grounds, and the demurrer was sustained. The plaintiff declined to amend, and thereupon judgment was entered that he take nothing by his action, from which he appeals.

The facts stated in the complaint are in substance as follows: Each of the counties named was, at all the times mentioned in the complaint, a body corporate and politic, and an organized county of the state of California. The southern boundary line of the counties of Humboldt and Trinity is coincident with the northern boundary line of the county of Mendocino, and is the fortieth parallel of north latitude. The

whole length of this boundary line is fifty-seven and four hundred and ninety-two thousandths miles, and the length of it between the counties of Humboldt and Mendocino is twenty-five and seven hundred and twenty-five thousandths miles, and between the counties of Trinity and Mendocino is thirty-one and seven hundred and sixty-eight thousandths miles.

On the twenty-second day of July, 1891, the said boundary line was not marked by natural objects or lines, or by surveys lawfully made, and, on that day, the board of supervisors of Mendocino county made application to the surveyor general of the state to have the said line surveyed and definitely established. In pursuance of this application the surveyor general, on August 17, 1891, duly appointed the plaintiff a surveyor to make a survey of said boundary line, and authorized and empowered him to make such survey. In pursuance of said appointment and authority the plaintiff made a survey of said boundary line, and definitely marked the same, and established the common corners of said three counties on the fortieth parallel of north latitude.

The said survey was made between September 1, 1891, and December 18, 1891, and on the last-named day the surveyor general duly approved the same, and it was filed in his office and is of record therein. The cost of making said survey was five thousand one hundred and sixty-one dollars and sixty-six cents, and the proportion thereof chargeable to the defendant was fourteen hundred and twenty-seven dollars and nineteen cents.

In November, 1892, and within a year after the last item of account had accrued, plaintiff filed with the clerk of the board of supervisors of defendant, and duly presented to said board for allowance, his claim and bill for his services in making said survey, the same being properly made out and verified. The said claim came up to be heard by the said board on January 4, 1893, and on that day the board made an order rejecting the claim, and refused to allow the same or any part thereof.

It is then alleged that the defendant is indebted to the plaintiff in the sum of fourteen hundred and twenty-seven dollars and nineteen cents, for the costs of making said survey; that the services of plaintiff in making the survey were reasonably worth that sum, and the same is due and owing by defendant to plaintiff, and that no part thereof has been paid. Wherefore, plaintiff demands judgment, etc.

The Political Code contains the following provisions:

"SEC. 483. It is the duty of the surveyor general: . . . 2. When required, to survey and mark the boundary lines of counties, cities, villages, and towns."

"SEC. 3969. All common boundaries and common corners of counties not adequately marked by natural objects or lines, or by surveys lawfully made, must be definitely established by surveys jointly made by the surveyors of all the counties affected thereby, and approved by the boards of supervisors of such counties, or by a survey made by the surveyor general, on application of the board of supervisors of any county affected thereby."

In sustaining the demurrer the superior court adopted the view, now most strongly relied upon by respondent, that, under the provisions of the code above cited, a survey to establish the common boundary between two or more counties must be actually made in the field by the surveyor general in person, or by a deputy, and that in no other way can a legal and effective survey for such purpose be made; that inasmuch as the complaint fails to show that the survey, which forms the basis of the action, was so made, no case is made showing any legal obligation upon defendant to pay any part of the cost of said work.

This, in our judgment, is an erroneous view of the meaning and purpose of the statute. In providing that such surveys shall be "made by the surveyor general" it was never contemplated by the legislature that that officer should go personally into the field and direct or perform the detail work of running lines and marking

boundaries. The general character of the many and important duties to be performed by the surveyor general, as such, and as *ex-officio* register of the state land-office, are wholly incompatible with any such requirement. What is meant and intended is that the survey shall be made under his direction and supervision, and when completed shall have his official sanction and approval. When so made and approved the survey becomes his act, and is "made by the surveyor general." By necessary implication, the law, in casting upon the surveyor general the duty of making public surveys, clothes him with the requisite power to enable him to properly perform that duty, and for this purpose it is perfectly competent for him to employ surveyors, and other functionaries usual and necessary in running the lines and doing the detail work required. He is made the agent of the state for the making of such surveys, and as such agent he may delegate the mechanical part of the work to others. (Civ. Code, sec. 2349.) Nor is it necessary that the field work should be done by or under the direct supervision of a deputy. The surveyor general is given but one deputy (Pol. Code, sec. 343), and has no power to appoint more (Pol. Code, sec. 877), and the general duties and powers of the deputy are the same as those of the principal (Pol. Code, sec. 865), excepting, of course, that they are exercised in the name of the latter. There is, therefore, no more reason for supposing that the legislature intended such work to be done by the deputy than by the surveyor general himself.

The other points made by respondent against the sufficiency of the complaint do not call for special notice, as they are without merit.

The judgment is reversed and cause remanded with directions to overrule the demurrer.

[S. F. No. 3. Department Two.—December 3, 1895.]

**IN THE MATTER OF THE ESTATE OF HENRY E. MULLIN, DECEASED.**

**PROBATE OF WILL—CONTEST—MENTAL CAPACITY OF TESTATOR—EVIDENCE OF ATTORNEY.**—In a contest over the probate of a will where the question of the capacity of the testator in making the will is in issue, evidence of occurrences between the testator and the attorney who drew the will, and became a subscribing witness thereto, and the declarations and instructions of the testator are admissible and competent evidence upon the question of the testator's mental capacity at the time of the testamentary act.

**ID.—PRIVILEGED COMMUNICATIONS—WAIVER OF PRIVILEGE—CONSTRUCTION OF CODE—ATTORNEY AS WITNESS.**—Section 1881 of the Code of Civil Procedure is designed to protect the interest of the client, whose privilege it is either to seal the lips of the attorney, or permit him to make disclosures of confidential communications, and where a testator has requested his attorney to become an attesting witness to his will, he thereby expressly waives the privilege.

f **ID.—PHYSICIAN AS WITNESS—WAIVER OF PRIVILEGE.**—Where an attending physician and surgeon who attended the deceased during his last sickness was made a subscribing witness to the will, the testator thereby waived the privilege of confidential communications to the physician accorded by subdivision 4 of section 1881 of the Code of Civil Procedure, and the witness is thereby rendered competent to testify as to the mental sanity and physical condition of the testator.

X **ID.—CROSS-EXAMINATION OF PHYSICIAN.**—A physician testifying to the mental sanity of the testator at the time of the testamentary act may be cross-examined not only as to his qualifications, but also as to his knowledge of the character of the patient's afflictions, and as to all the facts or circumstances within his knowledge and acquaintanceship with the patient, upon which his judgment was exercised and his conclusion reached.

**ID.—LEGAL EXECUTION OF WILL—FINDING AGAINST EVIDENCE.**—Where the evidence without conflict shows a legal execution of the instrument probated as a will, provided the deceased had sufficient mental capacity and understanding to execute the will, a finding to the contrary cannot be sustained where it appears without conflict that he had sufficient mental capacity and understanding to make the will.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. J. V. COFFEY, Judge.

The facts are stated in the opinion of the court.

*George A. Proctor*, and *D. I. Mahoney*, for Appellant.

Dr. Lagan, as a licensed physician, was incompetent to testify to anything that he had learned while attending

the deceased. (*Estate of Flint*, 100 Cal. 395; *Freel v. Market Street Ry. Co.*, 97 Cal. 40; *Gartside v. Connecticut Mut. Life Ins. Co.*, 76 Mo. 446; 43 Am. Rep. 765; *Briggs v. Briggs*, 20 Mich. 34; *Edington v. Mutual Life Ins. Co.*, 67 N. Y. 185; *Corbett v. St. Louis etc. Ry. Co.*, 26 Mo. App. 621; *Squires v. Chillicothe*, 89 Mo. 226; *Dilleber v. Home Life Ins. Co.*, 69 N. Y. 256; 25 Am. Rep. 182.) The patient being dead, no one had power to waive the privilege. (*Estate of Flint*, *supra*; *Freel v. Market Street Ry. Co.*, *supra*; *Westover v. Aetna Life Ins. Co.*, 99 N. Y. 56; 52 Am. Rep. 1; *Loder v. Whelpley*, 111 N. Y. 239; *Renihan v. Dennin*, 103 N. Y. 573; 57 Am. Rep. 770; *Matter of Coleman*, 111 N. Y. 220; *Morris v. Morris*, 119 Ind. 341; *Fraser v. Jennison*, 42 Mich. 206.) The fact that the attorney was a subscribing witness did not authorize him to testify as a draughtsman to instructions received. (*Matter of Chase*, 41 Hun, 203.)

*Dunne & McPike*, for Respondents.

There was a conflict of evidence, and this court cannot disturb the finding. (*Blythe v. Ayres*, 102 Cal. 260; *Estate of Carriger*, 104 Cal. 83.)

HENSHAW, J.—Mary T. Mullin, widow of deceased, offered his will for probate. A contest over its administration was raised by the brothers and sister of the deceased. The jury, upon special issues presented for their consideration, found that the deceased, at the time of the making of the purported will, was not of sound and disposing mind; that the deceased did not subscribe his name to the will, nor did any person so subscribe his name in his presence and by his direction; that no such subscription was made in the presence of the attesting witnesses, or was acknowledged by deceased to them to have been made by him or by his authority.

In accordance with these findings and others afterward to be considered, the court entered its judgment and decree denying the instrument probate, and from

this decree and from the order denying a new trial the proponent appeals.

1. George A. Proctor, called as a witness for proponent, was a subscribing witness to the will, and was also the attorney at law of the deceased in preparing and drawing the will. Proctor was summoned to prepare the will. He visited the deceased, who was then in his last sickness, received his instructions, retired to an adjoining room, reduced them to writing, and returned to the sick chamber, where the will was executed, he becoming a subscribing witness.

Objection was made by contestants to questions put to him upon direct examination touching the declarations made to him by deceased, and the instructions given him, and the occurrences at the interview immediately preceding the drafting of the instrument, upon the ground that the evidence was incompetent under section 1881, subdivision 2, of the Code of Civil Procedure.

The court sustained the objection. In this it erred. Evidence of the occurrences between the attorney and testator and the latter's instructions, would have offered a valuable aid to the jury in determining the question of the testator's mental capacity at the time of the testamentary act which followed immediately. The testimony was, therefore, clearly material, and the conversation was admissible if not in violation of section 1881 of the Code of Civil Procedure. That section is designed to protect the interest of the client. It is his privilege to seal the lips of his attorney or to permit him to make disclosures of confidential communications. When a testator has requested his attorney to become an attesting witness to his will, he thereby expressly waives the privilege. It is so held by the court of appeals of New York, under the provisions of section 835 of their Code of Civil Procedure, which, in substance, is identical with section 1881, subdivision 2, of our own. As is said in *Alberti v. New York etc. R. R. Co.*, 118 N. Y. 77: "But, although dead, he may leave behind him evidence which



indicates an express intention to waive the privilege; as, for instance, where he requests his attorney to sign the attestation clause of his will, he, by so doing, expressly waives the provisions of the statutes and makes him a competent witness to testify as to the circumstances attending its execution, including the mental condition of the testator at the time. (*In the Matter of Coleman*, 111 N. Y. 220.)"

It is true that the New York code, in section 836, now expressly authorizes an attorney who has become a subscribing witness to a will to testify to its preparation and execution, but this provision was inserted by amendment adopted in 1892, and merely followed the judicial declaration to that effect.

In the *Estate of Flint*, 100 Cal. 395, our code provisions and the policy of the law are fully considered, and *In re Wax*, 106 Cal. 343, adopts the interpretation above quoted.

2. Dr. John Lagan was called as a witness by proponent. He was a practicing physician and surgeon, attended the deceased professionally during his last sickness, and was a subscribing witness to the will. These facts were brought forth upon his direct examination. After detailing the circumstances attending the execution of the will, he was asked, still upon direct examination, his opinion of the "mental sanity" of the deceased at the time of such execution, and answered: "At the time he signed he appeared to me to be of sound mind. That is my opinion."

Upon cross-examination the court permitted counsel to interrogate the witness as to the character of his patient's affliction, which appeared to be serose apoplexy, resulting in hemiplegy, and to show that the brain is involved and affected by this disease; likewise, that the accompanying paralysis evinced itself upon the Thursday preceding the Monday upon which the will was executed and the testator died. In addition, the witness was interrogated as to the disclosures which the autopsy made of the physical condition of the deceased,

and finally he was subjected to a cross-examination, keen and comprehensive, touching his professional learning and qualifications, and as an expert.

Appellant contends that this cross-examination was error: 1. In violating the privilege accorded by section 1881, subdivision 4, of the Code of Civil Procedure; and 2. In permitting a cross-examination touching the expert qualifications of a witness who had been called to testify, as would an ordinary layman, merely to the mental condition of the deceased at the time he was called in to attest the will.

// But these objections are not to be upheld. In making his attending physician a subscribing witness to his will the deceased did exactly what he effected in the case of his attorney at law—waived the privilege and invited a full and proper examination of the matters and facts upon which their lips would otherwise have been sealed. The evidence was not objectionable as evoking privileged matter, and was pertinent and admissible if within the range of legitimate cross-examination. And that it was we entertain no doubt. ]

Upon direct examination the jury was informed that this witness was a physician and surgeon, with years of experience and practice; and that he was the physician who attended the testator during his last sickness. Then, for their enlightenment, he is asked his opinion of the mental condition of the testator at the time of the testamentary act, and answers that he was of sound mind.

The answer to the question of necessity involved the use of the intimate knowledge by the physician acquired in prescribing for and treating his patient. It would be absurd to say that it was to be limited to the outward seeming and appearance of the patient at that particular moment, or, in other words, that the witness would have been justified in answering (*exempli gratia*) that from external appearances, and judging as a layman, his opinion was that he was of sound mind, but that using his professional skill and knowledge, and inti-

mate acquaintanceship with the patient acquired as his physician, his opinion was that he was mentally incompetent.

Having answered that, in his opinion, the man was of disposing mind, there were open to the cross-examiner two fields of inquiry: 1. The soundness of the witness' judgment, or, in other words, his qualifications as an alienist; and 2. The character of the patient's infirmities, that is to say, the facts and circumstances upon which the judgment was exercised and the conclusion reached.

The cross-examination was confined within these bounds, and was strictly proper.

3. The jury, finding upon special issues, declared that Mullin neither subscribed nor authorized the subscription of his name to the will; that no such subscription was made in the presence of the attesting witnesses or acknowledged by deceased to have been made by him or by his authority; that the instrument was never declared by Mullin to the attesting witnesses to be his last will; that the attesting witnesses did not sign in the presence and at the request of Mullin; that the instrument was not witnessed as a will by two competent witnesses, each signing his name in the presence of Mullin and at his request; and, finally, that Mullin did not make his mark to said will in the presence of said subscribing witnesses.

These findings are absolutely without support, excepting such as they receive from the conclusion reached and expressed by the jury that at the time of the making of the will Mullin was not of sound and disposing mind. If into each of these special verdicts it is to be read by intendment that none of these things was done *because* Mullin was not of sound and disposing mind at the doing of them, then these findings may at least be understood if not approved. But, if they are to be accepted for their face value as declarations by the jury that the acts did not take place and the alleged facts had

no existence, then are they at absolute variance with the uncontradicted testimony.

Three persons were present at the time of the execution of the will. All were called as witnesses; all testified to substantially the same occurrences, and there was no conflicting or opposing evidence. The testimony of the witness Proctor, corroborated by that of the other two, is as follows:

"I walked around to the right of the bed and asked Mr. Mullin if he desired me to read the instrument that I held in my hand. He said yes. I read it in a loud tone of voice, and when I finished I asked him if that was the disposition he wanted made of his property. He said yes. I said, 'Do you want your wife to act as executrix without bonds?' He said yes. I then said, 'Please sign this instrument,' and he made a motion with his right hand to reach up this way [showing], and I reached and handed him the pen that was on the stand. He made the remark as I put the pen in his hand, 'I am afraid I cannot sign it.' Doctor Lagan supported his back, his hand trembled considerably, and I said, 'If you cannot sign your name, Mr. Mullin, it is not necessary under the law; you can make your cross, and I can sign it for you if you so direct me.' He says, 'Very well; do so.' He made his cross by my supporting his wrist and hand. He held the pen in his fingers, his hand was trembling very perceptibly, and I steadied his hand and he made his mark. I then stepped to the stand and wrote Henry E. Mullin as it appears there, and my name to the left of it as a witness to that mark, and I then stepped back to his bedside and said, 'Mr. Mullin, what is this instrument?' and he replied, 'That is my will.' I asked him, 'Do you request Doctor Lagan, Mr. Duggan, and myself to witness it?' He answered yes. We each of us signed our name at the bottom of the instrument as they appear on the instrument."

This evidence does not require analysis. It shows a

legal execution of the instrument, provided the deceased had sufficient mental capacity and understanding, and it is not contradicted. (*In re Guilfoyle*, 96 Cal. 598.)

The judgment and order appealed from are reversed and the cause remanded for a new trial upon the contest.

TEMPLE, J., and MCFARLAND, J., concurred.

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[No. 15668. In Bank.—December 3, 1895.]

**N. W. GRISWOLD, APPELLANT, v. JAMES S. PIERATT, RESPONDENT.**

**NEGLIGENCE—MASTER AND SERVANT—BREACH OF CONTRACT—SETTLEMENT—NEW CONTRACT—DEFENSE—COUNTERCLAIM—CROSS-COMPLAINT.**—In an action against a defendant employed to bud a quantity of young fruit trees, for alleged negligence in executing the contract, to the damage of the plaintiff, where the answer denies the alleged negligence, and pleads an accounting and settlement of all accounts and differences in relation to the budding of the trees, and the making of a new contract in connection with such accounting and settlement for payment of the services, alleged to have been broken by the plaintiff, for which breach the defendant pleads a counterclaim, and also a cross-complaint, claiming damages for breach of the new contract in a sum less than three hundred dollars, the answer discloses a defense to the plaintiff's demand; but the facts pleaded are insufficient to constitute a counterclaim or cross-complaint, because it does not show a cause of action arising out of the transaction set forth in the complaint, nor connected with the subject of the action; nor is the amount of the defendant's demand against the plaintiff within the jurisdiction of the superior court to justify recovery upon an independent counterclaim.

**ID.—ACCOUNTING—NEW CONTRACT—IMPROPER ACTION.**—Where an accounting and settlement is had between the parties under a prior contract, by which a different compensation and mode of compensation is fixed for services rendered, and the time for performance enlarged, the accounting and settlement becomes a new contract, and is conclusive upon both parties unless impeached for fraud, accident, or mistake, and no action will lie upon the original contract while the new contract remains in force.

**ID.—JURISDICTION—COUNTERCLAIM—JUSTICE'S COURT.**—In an action in the superior court arising upon contract, a counterclaim arising upon a different contract from that pleaded by the plaintiff, not set up as a defense but as a ground for an affirmative judgment against the plaintiff, is not within the jurisdiction of the superior court where the amount of the counterclaim is less than three hundred dollars, and any action thereupon must be by independent suit in the justice's court.

APPEAL from a judgment of the Superior Court of Sonoma County. S. K. DOUGHERTY, Judge.

The facts are stated in the opinion.

*E. H. Wakeman*, and *J. H. Barham*, for Appellant.

The court below had no jurisdiction of the cause of action set forth in the cross-complaint, which must stand alone upon its own merits, and should be limited to equitable relief. (*Pomeroy's Remedies*, sec. 97; *Bliss on Code Pleading*, sec. 390; *Hobbs v. Duff*, 23 Cal. 626; *Haskell v. Haskell*, 54 Cal. 264; *Coulthurst v. Coulthurst*, 58 Cal. 239; *Kreichbaum v. Melton*, 49 Cal. 55; *Harrison v. McCormick*, 69 Cal. 618.) The matter stated as a counterclaim does not amount to a counterclaim. (*Moyle v. Porter*, 51 Cal. 639; *Carpenter v. Hewel*, 67 Cal. 590; *James v. Center*, 53 Cal. 31; *People v. Dennison*, 84 N. Y. 279.) The superior court had no jurisdiction of the counterclaim. (Const., art. VI, sec. 5; Code Civ. Proc., sec. 76; *Wiggins v. Guthrie*, 101 N. C. 661; *St. Louis Nat. Bank v. Gay*, 101 Cal. 286; *Harrison v. McCormick*, *supra*; *Belleau v. Thompson*, 33 Cal. 495; *Cragin v. Lovell*, 88 N. Y. 263.)

*Rutledge & Pressley*, for Respondent.

It is immaterial whether the matter pleaded was proper subject to a cross-complaint or counterclaim. (*Wilson v. Smith*, 61 Cal. 209; *Gates v. McLean*, 70 Cal. 42, 46; *Hooker v. Thomas*, 86 Cal. 176, 178; *Mitchell v. Beckman*, 64 Cal. 118; *Emeric v. Alvarado*, 64 Cal. 529.) The matter pleaded was in the nature of recoupment. (Code Civ. Proc., sec. 438, subd. 1; *Waterman on Setoff*, sec. 466; *Puller v. Stainforth*, 11 East, 232; *Ives v. Van Epps*, 22 Wend. 155.) The amount of the recoupment cannot cut any figure in fixing the jurisdiction. (*Waterman on Setoff*, secs. 464, 468, 469.) Under the code the counterclaim embraces recoupment and setoff, and more. (Code Civ. Proc., secs. 437-41.) The enlargement of the counterclaim by allowing a judgment does not

change its nature. (Code Civ. Proc., sec. 666.) A limitation of counterclaim is imposed only in the justices' courts. (Code Civ. Proc., sec. 855.) There is no limitation in the jurisdiction of the superior court in the matter of counterclaim, but counterclaim is what the code makes it. (*Stoddard v. Treadwell*, 26 Cal. 294, 309.) Jurisdiction depends on the *ad damnum* clause of the complaint, and not on the counterclaim. (*Solomon v. Reese*, 34 Cal. 33; *Derby v. Stevens*, 64 Cal. 287; *Sanborn v. Contra Costa County*, 60 Cal. 427; *Dashiell v. Slingerland*, 60 Cal. 654-57; *Bailey v. Sloan*, 65 Cal. 388; *Greenbaum v. Martinez*, 86 Cal. 461; *Lord v. Goldberg*, 81 Cal. 596-99; 15 Am. St. Rep. 82.) Counterclaim includes the equitable setoff. (*Walker v. Sedgwick*, 8 Cal. 398-405; *Carpentier v. Oakland*, 30 Cal. 439, 442, 443; *Pomeroi on Remedies*, sec. 764; *Roberts v. Donovan*, 70 Cal. 112, 113; *Glen etc. Mfg. Co. v. Hall*, 61 N. Y. 226, 235, 236; 19 Am. Rep. 278; *Clark v. Taylor*, 91 Cal. 552; *Webster v. San Pedro Lumber Co.*, 101 Cal. 326; *Hart v. Cooper*, 47 Cal. 77.) Cross-demands which are compensated constitute counterclaims. (Code Civ. Proc., sec. 440; *Lyon v. Petty*, 65 Cal. 322, 324.) A cross-complaint against the plaintiff is in the nature of a counterclaim. (*Kendall v. Waters*, 68 Cal. 26; *Harrison v. McCormick*, 69 Cal. 616, 618, 619.) If the defendant is entitled to affirmative relief on a counterclaim he is entitled to judgment on it. (Code Civ. Proc., sec. 666.)

**BRITT, C.**—Plaintiff alleged in his complaint that he employed defendant to bud a quantity of young fruit trees; that defendant agreed to bud the same in a careful and skillful manner, and thereupon entered upon the execution of the contract and budded the trees, but so negligently performed the work in certain specified particulars that plaintiff suffered damage to the amount of eighteen hundred and fifty-eight dollars and fifty cents, for which sum he demanded judgment. Defendant admitted in his answer the fact of his employment by plaintiff and that he budded the trees, but denied

the alleged negligence, and averred in substance that any damage to the trees of plaintiff arose from the latter's mismanagement in the matter. Then, for a counterclaim, defendant pleaded that plaintiff agreed to pay him for his services in budding the trees so much as such services were reasonably worth; that he, the defendant, completed the work on October 29, 1892, and that his services were reasonably worth the sum of two hundred and forty dollars; that on November 1, 1892, the parties "had an accounting and settlement of all accounts and differences between them in relation to budding of said trees, and upon said settlement and in . . . full discharge of the said contract, and in full settlement thereof, the plaintiff agreed to pay to defendant on December 1, 1892, the sum of one hundred dollars, and to deliver to defendant eleven hundred and twenty-five of said budded trees upon demand"; that plaintiff at the same time wrote his acceptance of a draft drawn by defendant on him for said sum of one hundred dollars, such acceptance by its terms making the draft payable December 1, 1892; and also executed to defendant a written promise to deliver to him said eleven hundred and twenty-five trees; that defendant presented said draft at maturity to plaintiff for payment, which was refused; that the cost of protesting the same, paid by him, was five dollars; that plaintiff delivered four hundred of the trees only and refused to deliver the remainder, and that those undelivered were worth eighty-seven dollars and fifty cents; wherefore he prayed judgment against plaintiff for one hundred and ninety-two dollars and fifty cents, etc. He also filed a cross-complaint alleging the same facts set out in his counterclaim and prayed thereon the same relief.

After trial the court found all the issues in favor of the defendant, and awarded him judgment against plaintiff for the amount claimed by him (less the sum of five dollars, cost of protest of the draft) and costs of the action.

Plaintiff appeals from the judgment; and the point



made is that the facts pleaded as a counterclaim are insufficient for that purpose; because, as claimed, they do not constitute a cause of action arising out of the transaction set forth in the complaint or connected with the subject of the action (Code Civ. Proc., sec. 438), and because the amount of defendant's demand against plaintiff is less than three hundred dollars, and so not within the jurisdiction of the superior court. On similar grounds, apparently, it is also maintained that the cross-complaint is ineffectual as such.

Of course, if the matters set up by defendant constitute a cause of action in his favor properly cognizable by the superior court, either as a counterclaim or a cross-complaint in this suit, the judgment must be upheld.

The transaction between the parties on November 1, 1892, by which the compensation to be rendered defendant was fixed in money and trees, and the time of performance by plaintiff was enlarged, amounted to an agreed statement of the account of defendant for budding the trees (*Baird v. Crank*, 98 Cal. 293, 297), and even something further. It was a new contract (Civ. Code, 1531, 1697) for which the original contract, or the performance thereof by defendant, furnished the consideration (*Auzerais v. Naglee*, 74 Cal. 60), and became, in the absence of legal impeachment, in itself an agreement, conclusive on both parties that, as the net result of such performance, the defendant was entitled to receive the compensation then fixed. On such new contract an action would lie in defendant's favor (*Green v. Thornton*, 96 Cal. 67), and would be properly brought on the written instruments then executed by plaintiff. (*San Jose Savings Bank v. Stone*, 59 Cal. 183.)

The original contract was suspended, if not extinguished (Civ. Code, 1531, 1682, 1697); the plaintiff, while the new compact between himself and defendant remained in force, could maintain no action for any breach of duty by defendant under the former. His only proper course, if such breach had occurred, was to

impeach the settlement by appropriate pleading for fraud, accident, or mistake. (*Green v. Thornton, supra.*) His complaint here is devoid of any allegation for that purpose. Had defendant brought his action on the written instruments made to him by plaintiff, the latter could not have resisted recovery upon the ground of any defect in defendant's performance of the original contract, unless by showing that the settlement of November 1, 1892, was induced by fraud or mistake. (*Walker v. Millard*, 29 N. Y. 375; *Thorpe v. White*, 13 Johns. 53.) For like reasons the defendant could maintain no action against plaintiff for compensation under the original contract. Since defendant pleaded facts showing that the original contract was superseded by a new obligation, he showed that neither party has any rights based upon it, and, as there is no cause of action arising therefrom in favor of plaintiff, so there is no right of recoupment arising from it in favor of defendant; it has ceased to be a "transaction" giving rise to reciprocal demands so as to be the basis for affirmative relief under subdivision 1 of section 438 of the Code of Civil Procedure. Consequently, the facts stated by defendant, although good as a defense, were insufficient as a counterclaim under that subdivision. For similar considerations such facts were improperly pleaded as a cross-complaint by defendant.

But they show a cause of action in his favor "arising upon contract"; and it is a different contract from that described in the plaintiff's complaint; and hence is rightly pleaded as a counterclaim under subdivision 2 of said section 438, provided the court had jurisdiction to entertain it.

The constitution of the state allows to the superior court jurisdiction in all "cases at law . . . in which the demand . . . amounts to three hundred dollars." (Const., art. VI, sec. 5.) This court has held that, "the demand spoken of in the constitution is a demand for judgment, evidenced by the prayer of a complaint, and a statement of facts which can uphold the

judgment prayed for." (*Derby v. Stevens*, 64 Cal. 288.) Can it make any difference in the construction of this provision that the prayer for judgment and the statement of facts occur in a counterclaim on an independent contract instead of an original complaint? Is the constitution to have one meaning as applied to the demand of a plaintiff, and a diametrically opposite meaning as applied to the demand of a defendant in such a case? It is incredible that the framers of the instrument intended that the limitation under view should have effect or not according to the relation to the record occupied by the litigant seeking to enforce the demand. (See *Picquet v. Cormick*, Dud. (Ga.) 21.) In that case the court, speaking of a statute of the state of Georgia authorizing various defenses in an action, said: "This will allow the plea of setoff where there exist mutual debts; but it will not enlarge the jurisdiction of the court, and enable it to take cognizance of a debt or demand set up by a defendant which it would not entertain for a plaintiff. The limitation must apply alike to each party, and the court can no more take cognizance of a cause for one than for another, where the pleadings themselves show the debt or demand not to be within its jurisdiction."

Beyond question, if the defendant had commenced an action on the matters exhibited in his setoff, he must have done so in an inferior court, and in such action the plaintiff could not have set up any claim arising on contract in his, plaintiff's, favor, unless below three hundred dollars in amount. (Code Civ. Proc., 855; *Maxfield v. Johnson*, 30 Cal. 545.) It scarcely seems probable that the makers of the law designed to provide in such a case that the defendant may have the right of setoff in the superior court merely because he is defendant, when, if he had commenced his action—as he must have done if he had commenced at all—in a court having jurisdiction of demands less than three hundred dollars, the plaintiff would have been debarred the like privilege.

Of course, what is here said on the subject of jurisdiction has no application to the counterclaims provided for in the first subdivision of section 438 of the Code of Civil Procedure; the amount of the cross-demand under that subdivision is of no moment for jurisdictional purposes; our remarks are to be understood as confined to the unconnected causes of action mentioned in the second subdivision of that section, and limited also to cases presenting the substantial features of the present. If the setoff, less than three hundred dollars in amount, exclusive of interest, held by a defendant, is pleaded by him as purely defensive matter in reduction or extinguishment of the claim of the plaintiff in an action triable by the superior court, it may well be that the court can properly entertain the same; such was the case in *Hart v. Cooper*, 47 Cal. 77. It is under the statute (Code Civ. Proc., 440) perhaps as much a matter of defense merely as would be a plea of payment of a like sum. But where a defendant in that court shows by his pleading, as in this instance, that the plaintiff's action, arising on contract, is wholly unfounded, we think it clear that he cannot also set up a cause of action on a different contract as the foundation for an affirmative judgment against the plaintiff, unless his demand, exclusive of interest, amounts to three hundred dollars.

The counterclaim set up in *Webster v. San Pedro etc. Co.*, 101 Cal. 326, seems to have been properly referable to subdivision 1 of section 438 of the Code of Civil Procedure; and the same is probably true of that mentioned in *Clark v. Taylor*, 91 Cal. 552. Nothing is decided in either of those cases contrary to the view here stated.

Our conclusion is reached with less reluctance, because the defendant may yet sue and recover in the proper court the sums due to him for breach of the plaintiff's contract, evidenced by the written instruments of November 1, 1892.

The judgment should be modified by striking there-

from the recovery of one hundred and ninety-nine dollars and seventy-five cents and interest thereon allowed to defendant, and as so modified the same should be affirmed.

**BELCHER, C., concurred.**

For the reasons given in the foregoing opinion the judgment is modified by striking therefrom the recovery of one hundred and ninety-nine dollars and seventy-five cents with interest thereon allowed to defendant, and as so modified the same is affirmed.

**McFARLAND, J.,    HARRISON, J.,  
TEMPLE, J.,        GAROUTTE, J.**

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[No. 15915. In Bank.—December 4, 1895.]

**IN THE MATTER OF THE GUARDIANSHIP OF THE ESTATES  
OF GUSTAVE H. BEISEL ET AL., MINORS.**

**GUARDIANSHIP—SETTLEMENT OF ACCOUNTS OF MOTHER WITH MINORS—ADULT CHILD IMPROPERLY INCLUDED—UNPROFITABLE INVESTMENT—SALE PROCURED BY ADULT CHILD—DIFFERENT MODES OF ACCOUNTING.**—Where the estate of a decedent was distributed one-half to his widow, and the other half to the three minor children, and the widow, as mother of the minor children, without letters of guardianship, took charge of the persons and estates of the minors, and with the money belonging to the minors purchased real estate for their benefit in good faith, which was afterward sold at a loss, upon the settlement of a subsequent legal guardianship of two of the minor children, the other child being an adult daughter, for whom no guardian was ever appointed, and who had become of age before the property was sold and who had brought an action for partition and procured the sale thereof, and voluntarily accepted her share of the proceeds of the sale, and who was not a formal party to the accounting with the two minor children, should not be included in the accounting with them, and any accounting had with her should be settled upon a different basis from the accounting with them, she not being entitled to be credited, as are the minors, with one-third of the original sum received from the estate of their father with interest thereon, but only with her one-third of the proceeds of the sale; and no items of credit or charges to her should appear in the accounting with the minor children.

**ID.—ALLOWANCE TO MOTHER AS QUASI GUARDIAN—MAINTENANCE OF MINORS—EXPENDITURES—TRUST—ACCOUNTING IN EQUITY.**—Where the mother of minor children has acted in good faith for their benefit without letters of guardianship, she is chargeable in equity

as a *quasi* guardian, or trustee of their estates, and an accounting and settlement of such trust, after the issuance of letters of guardianship, is in the nature of an accounting in equity, to be determined upon equitable principles; and the court has jurisdiction in such accounting to allow reasonable and proper credits to her for maintenance of the minor children, and for expenditures incurred on their account prior to the letters of guardianship.

**ID.—ALLOWANCE OUT OF PROPERTY OF MINOR—INCOME—PRINCIPAL.**—A court of equity will allow all reasonable payments for the maintenance and education of an infant made by the person in whose hands his property is held, out of the income of the property, if his father is dead or unable to support him; and where the income is insufficient for his maintenance and education, equity will break into the principal.

**ID.—ALLOWANCE TO MOTHER FOR PAST MAINTENANCE—SEPARATE ESTATE—CRITERION.**—A mother will be allowed in equity for the past maintenance of her children, from the death of the father, out of the estate of the children, though she has a separate estate; and the criterion for determining whether a past maintenance should be allowed to her is whether a chancery court would have authorized it in advance.

**ID.—ACCOUNTING OF TRUST—STATUTE OF LIMITATIONS.**—In the accounting and settlement of a voluntary trust with the mother as *quasi* guardian of minor children, the expenditures made by her for the benefit of the children must be deemed in equity as having been made out of their funds, and as constituting an equitable offset to the liability of the trustee who could not plead the statute of limitations in defense to the liability; and it cannot be objected that an allowance for their maintenance and for expenditures incurred for them prior to letters of guardianship is barred by the statute of limitations.

**ID.—DISCRETION AS TO AMOUNT OF ALLOWANCE.**—The amount of an allowance for maintenance of minor children is in the discretion of the court, and will not be disturbed upon appeal where no abuse of discretion appears.

**ID.—PRIOR ALLOWANCE DURING LEGAL GUARDIANSHIP—FURTHER ALLOWANCE UPON ACCOUNTING OF TRUST.**—The fact that there was an allowance during the existence of a legal guardianship, out of the money in the hands of the guardian, for the support of the minor children by the mother, does not preclude a further allowance to her upon an accounting by her of her trust during the preceding years in which she is charged with the principal sum received by her as the children's share of the estate of their deceased father, with interest thereon.

**ID.—EXPENDITURES UPON REAL ESTATE OF MINORS.**—Where the minors are credited in the account of the *quasi* guardianship with their full share of the rents of real estate belonging to them, they are justly chargeable with their proportion of the expenditures incurred by their mother, in good faith, in the improvement of the property, and in the payment of necessary expense for taxes, insurance, and repairs.

**ID.—ALLOWANCE OF ATTORNEY'S FEES—DISCRETION.**—The allowance of a reasonable amount of attorney's fees to the mother of the children is within the discretion of the court.

**ID.—PROBATE COURT—ACCOUNTING OF TRUST IN EQUITY—JURISDICTION—WAIVER OF OBJECTION.**—Where the accounts of the mother as *quasi* guardian of the children prior to the letters of guardianship are settled in the probate court, and all objections to its jurisdiction are expressly waived at the hearing, although the account was entitled in the matter of the guardianship of the estates of the minors, the accounting is in its nature an accounting in equity by the mother of the minors as trustee of their estates, and will be upheld and treated as such upon appeal.

**ID.—SETTLEMENT OF ACCOUNTS OF MOTHER WITH MINORS.**—In the settlement of the accounts of the mother with the minors each minor should be credited with his share of the principal of the moneys received by the mother, and interest thereon, and also with his share of the proceeds of the sale of personal property, and of the rents of the real estate, and the mother should be credited with the share of each minor in the whole expense incurred by her in respect of his proportionate share, and with his share of the allowance made by the court for the support of the minors, both prior and subsequent to the guardianship, and with his proper share of attorney's fees allowed by the court, and she should also be credited with the sum paid to the guardian of each minor on account of proceeds of the sale of the house and lot in which she had invested the funds of the minors, and any payments made by her to the estate of the minors.

**APPEAL** from an order of the Superior Court of the City and County of San Francisco settling the accounts of the mother of minor children in the matter of the guardianship of their estates. **J. V. COFFEY**, Judge.

The facts are stated in the opinion of the court.

*Otto Tum Suden*, for Appellant.

A testamentary guardian cannot act until he qualifies, and until then his acts are void. (*Aldrich v. Willis*, 55 Cal. 81.) Conceding that the probate court is the proper forum for the settlement of Mrs. Sherrer's account as guardian *de son tort* of both minors, when she essays such an account she should make it on her own behalf, covering the period only to the date when she was legally appointed and qualified. (*In re Estate of Thompson*, 101 Cal. 849; *In re De Leon's Estate*, 102 Cal. 537.)

*Shadburne & Herrin*, for Respondent.

As all the parties here expressly acquiesced in the jurisdiction of the probate court to hear and settle the

account, it thereby became a court of equity for such purpose. (*In re Estate of Thompson*, 101 Cal. 349; *In re De Leon's Estate*, 102 Cal. 537.) The amount to be granted to a widow of a decedent for the support of herself and minor children is within the discretion of the probate court, and its action in making the allowance will not be disturbed upon appeal, unless an abuse of discretion is clearly shown. (*In re Lux*, 100 Cal. 594.) The statute of limitations does not begin to run against a creditor until his claim has become absolute and enforceable by action. (*Ex parte Rogers*, 63 N. C. 110; *Woerner's American Law of Administration*, 848, 1268.)

**THE COURT.**—After rehearing of this cause the opinion of Commissioner Vanclicf, heretofore filed, is adopted as the opinion of the court down to paragraph 4, in place of which, and of the judgment of the department, the following is substituted:

4. Errors in the statement and settlement of respondent's account have resulted from the manner in which the debts and credits of the two minors have been mingled with each other and with the account of Emma N. Beisel. She is not formally a party to the proceeding, and the court does not appear to have acquired jurisdiction to make a decree binding upon her. But, if she has made herself a party to the settlement, or shall hereafter become a party, her account should be settled upon a different basis from that of the two minors. That is to say, she is not entitled to be credited with one-third of the original \$4,007 and interest, for the reason that she has elected to take and has actually received her third of the proceeds of the sale of the house in which that money was invested.

As to the two minors, the account with each should be stated and settled separately as follows: The respondent in each account should be charged with one-third of cash:

Principal .....\$4,007.00 ,



Interest . . . . .	1,800.19
From sale of personalty . . . . .	\$ 618.00
From rents of realty . . . . .	1,987.00

Total . . . . .	\$2,605.00
Half of which belongs to minors . . . . .	1,302.50

Making a total of . . . . .	\$7,109.69
One-third of which is . . . . .	2,369.89

In each account she should be credited with

One-sixth of the whole expense of property..	\$ 710.00
One-half of support of minors for 52 mos. . . . .	1,040.00
One-half of family allowance for two years and one month . . . . .	500.00
And one-half attorney's fee . . . . .	50.00

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\$2,300.00

Besides this, in her account with George D. Beisel, she should be credited with \$1,218, or whatever other sum or sums she has paid the guardian of his estate on account of proceeds of sale of house and lot, or otherwise.

The judgment is reversed and cause remanded for further proceedings in accordance with the views herein expressed.

The following is the portion of the opinion rendered in Department One on the 27th of June, 1895, which is adopted by the court in Bank:

VANCLIEF, C.—This is an appeal by the guardian of the estate of George D. Beisel, a minor, from judgment of the superior court settling an account of Caroline Sherrer, the mother of Gustave H. Beisel and George D. Beisel, minors, and Emma N. Beisel, now of lawful age, with the estates of the minor children.

Caroline Sherrer, formerly Caroline Beisel, was the widow of Jacob Beisel, deceased, whose estate was distributed September 1, 1887, one-half to his widow and the other half to her three minor children. The property thus distributed to the minor children consisted of

\$4,007 in money, and a half interest in certain real estate, consisting of tannery property.

There was no legal guardianship of the estates of either of the minor children until the thirteenth day of May, 1892, when letters of guardianship of the persons of Gustave H. and George D. Beisel, and of the estate of Gustave H. Beisel, were granted to Caroline Sherrer, and at the same date F. W. Van Reynegom was appointed as guardian of the estate of George D. Beisel.

Between the time of the distribution of the estate of Jacob Beisel, in 1887, and the issuance of the letters of guardianship, in 1892, the mother of the minor children took charge of the persons and estates of the minors, and with the money belonging to the minors purchased certain real estate on Capp street, in the city and county of San Francisco, for their benefit, taking the conveyance in her name, in trust for them. The rental value of this property was about \$360 per year, and Mrs. Sherrer expended on it about \$600 in repairs and street work, besides taxes.

In September, 1892, Emma N. Beisel, having arrived at full age, brought an action for partition of the real estate thus purchased, and procured a sale thereof, the proceeds of which netted only \$3,654. One-third of that sum, amounting to \$1,218, was paid to Emma N. Beisel, and a like sum distributed, returned, and inventoried in each of the estates of the minor children, besides one-sixth interest of each in the tannery property. Thereafter, on the 20th of January, 1894, the superior court made an order in the matter of the estates of both minors, allowing to Caroline Sherrer the sum of \$20 per month for the support and maintenance of each of them, from and after the twentieth day of January, 1892, which allowance was paid, one-half from each estate.

On the twenty-first day of February, 1894, Caroline Sherrer presented to the superior court for settlement, in the matter of both of the estates of her minor children, an account embracing the entire period of her

management of the property of all of her children, charging herself with the entire \$4,007 distributed to them from their father's estate, with legal interest thereon, from September, 1887, to February, 1894, amounting to \$1,800.19, with half of personal property sold in the sum of \$309, and with half the rents of the tannery property in the sum of \$993.50, making an aggregate of \$7,109.69. She claimed credit, on the other hand, for one-half of the expenditures and improvements, on account of the tannery property, in the sum of \$2,130, including therein one-half of large expenditures in the building of cottages, grading, house moving, taxes, insurance, water rates, plumbing, sewer, and other items of expenditure on account of the property. She also claimed credit for support of the boys, at the rate of \$20 per month, for the period of four years and four months from September, 1887, prior to the allowance made by order of the court, aggregating the sum of \$2,080, and a credit of \$720 for support of Emma N. Beisel during her minority, for a period of three years at the same rate, besides credits of \$1,000 under the allowance before made by the court; \$100 for attorney's fees; and \$500 for compensation for her services as guardian. The total of credits claimed in the account aggregated \$6,530.48. The account, as presented, states a balance due from Mrs. Sherrer to the minors of \$571.

The court found that there was no bad faith in the management of the estate, and that Mrs. Sherrer should be charged with the sum of \$4,007, and annual interest at seven per cent, and that she should be credited with the amounts returned into court to the credit of each of the minor children from the proceeds of the sale of the Capp street property.

The court further found that the account was supported by evidence and proper vouchers, and allowed the same in all respects, save the item of \$500 for compensation of guardianship, which was rejected as premature, the guardianship not being yet terminated; and the account was settled by allowing a credit of the resi-

due of the money in the hands of both guardians, amounting to \$1,216, \$658 being in the hands of F. W. Van Reynegom as guardian of the estate of George D. Beisel, and \$558 in the hands of Caroline Sherrer, as guardian of the estate of Gustave H. Beisel.

1. An error is apparent in the account in including charges and credits on account of Emma N. Beisel, who was not a party to the accounting. Mrs. Sherrer has charged herself with \$2,369.89 too much on account of Emma N. Beisel's one-third interest in the sum of \$7,109.69, accounted for by Mrs. Sherrer. It is unnecessary to decide whether Emma N. Beisel is estopped by her proceeding in partition from claiming any further allowance from her mother on account of her share of the original \$4,007, and interest thereon, in addition to the sum of \$1,218 obtained by her upon sale of the Capp street property, as the result of her suit in affirmance of the purchase of that property for her benefit. It is sufficient to say that, not being a party to this accounting, no items, either of credit or charge to Emma N. Beisel, should appear in the account. The items credited to Mrs. Sherrer on account of Emma N. Beisel's one-sixth of the improvements and expenditures on the tannery property amount to \$710. The sum of \$720 is charged for her board for three years. These items, deducted from the \$2,369.89, leave a balance of account in favor of Emma N. Beisel in the sum of \$939.89. There is no deduction in the account for the \$1,218 paid to Emma N. Beisel; and the two minor children are credited in the settlement with the aggregate balance of the whole account, after deducting only the \$500 for compensation of Mrs. Sherrer, as guardian, and crediting the remainder of the funds in the estates of the minors. The minors were thus benefited in the sum of \$939.89, to which they were not entitled. This error is against the respondent, and could not be ground for reversal upon this appeal; yet it is proper to notice it, in view of the contention of appellant that the court erred in allowing, as against the minor children, the items in the account for board of

Emma N. Beisel, and for her share of expenditures of the tannery property. This contention is correct; but the error is without prejudice to the appellant, since the estate of George D. Beisel is profited by one-half of the balance of error of \$939.89, with which Mrs. Sherrer is charged in the settlement with the two minors, on account of her having charged herself with Emma N. Beisel's interest in the estate of Jacob Beisel, deceased, without the allowance of any credit for the \$1,218 paid to her.

2. Appellant contends that there was no warrant for an allowance by way of credit to Mrs. Sherrer for maintenance of the minor children during the time when there were no letters of guardianship upon their estates. But she is chargeable in equity as a *quasi* guardian or trustee of their estates, and the accounting must be deemed in the nature of an accounting in equity, and determined upon equitable principles. The court finds in substance that the action of Mrs. Sherrer, as the mother of the children, was *bona fide*; and it had jurisdiction to allow reasonable and proper credits to her for their maintenance and for expenditures incurred on their account. A guardian *de facto*, who is not a guardian *de jure*, will be held to account in equity only upon equitable principles, and will be allowed for all proper disbursements for the benefit of the ward. (*Peale v. Thurmond*, 77 Va. 753.) "The rule is that where an infant has property of his own, and his father is dead, or is not able to support him, he may be maintained and educated out of the income of property absolutely his own, by the person in whose hands the property is held; and a court of equity will allow all payments made for this purpose which appear upon investigation to have been reasonable and proper." (Schouler on Domestic Relations, sec. 238.) Where the income is insufficient for the maintenance and education of a child, equity will break into the principal. (*Barlow v. Grant*, 1 Vern. 255; *Bridge v. Brown*, 2 Younge & C. 181; *Ex parte Green*, 1 Jac. & W. 253; *Newport v. Cook*, 2 Ashm. 332; *Osborne*

v. *Van Horn*, 2 Fla. 360.) A mother will be allowed in equity for the past maintenance of her children, from the death of the father, out of the estate of the children, though she has a separate estate. (*Wilkes v. Rogers*, 6 Johns. 567, 589, 593; *Gladding v. Follett*, 2 Demarest, 58; *Aynsworth v. Pratchett*, 13 Ves. 320; *In re Besondy*, 32 Minn. 385; 50 Am. Rep. 579; *Osborne v. Van Horn*, *supra*.) The criterion for determining whether a past maintenance should be allowed is whether a chancery court would have authorized it in advance. (*Alston v. Alston*, 34 Ala. 27.)

Appellant objects that the allowance for maintenance of the children prior to the accounting was barred by the statute of limitations. But the accounting was of a voluntary trust, and no allowance to a trustee for expenditures properly incurred during the administration of the trust can be considered as barred by the statute of limitations. The expenditures made for the benefit of the children must be deemed in equity as having been made out of their funds, and as constituting an equitable offset to the liability of the trustee, who could not plead the statute of limitations in defense to the liability. The credits are no more barred by the statute than is the charge against the trustee. It would be inequitable to hold the mother to account for principal and interest of the sums received by her from the estate of her husband for the benefit of the minor children for nearly six and a half years, and to allow her no offset for maintenance of the children, and for expenditures made in good faith for their benefit during that period.

No abuse of discretion appears as to the amount of the allowance for maintenance of the children. Nor did the fact of the allowance for two years out of the \$2,436 paid into court, as the proceeds of the Capp street property, preclude a further allowance upon an accounting by Mrs. Sherrer of her trust during the preceding years, in which she is charged with the principal sum received by her as the children's share of the estate of

their deceased father, in September, 1887, with interest thereon until February, 1894.

The minors are credited in the account with their full share of the rents of the tannery property, and they are justly chargeable with their proportion of the expenditures incurred by their mother in good faith in the improvement of that property, and in the payment of necessary expenses for taxes, insurance, and repairs. The allowance of attorney's fees was in the discretion of the court, and was reasonable in amount.

3. The jurisdiction of the court to settle the account of the mother with her two minor children was assailed in the objections of appellant to the account, but all objections to the jurisdiction were expressly waived at the hearing. Although the account was entitled "In the Matter of Guardianship of the Estates of Gustave H. Beisel and Geo. D. Beisel, Minors," the accounting was in its nature an accounting in equity by the mother of the minors as trustee of their estates. (*Estate of Thompson*, 101 Cal. 349; *Estate of De Leon*, 102 Cal. 537.)

SEARLS, C., and BRITT, C., concurred.

For the reasons given in the foregoing opinion the cause is remanded with instructions to modify the judgment in accordance with this opinion.

VAN FLEET, J., GAROUTTE, J., HARRISON, J.

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[No. 15942. Department One.—December 6, 1895.]

LOWELL M. REDFIELD ET AL., RESPONDENTS, v.  
OAKLAND CONSOLIDATED STREET RAILWAY  
COMPANY, APPELLANT.

**NEGLIGENCE—ACTION FOR DEATH—EXCESSIVE DAMAGES.**—In an action for damages for the death of a wife and mother, prosecuted by her husband and minor children, a recovery of fourteen thousand dollars damage will not be disturbed upon appeal as excessive, where, after a careful review of the testimony, it cannot be said that the damage awarded by the jury appears to have been given under the influence of passion or prejudice.

**ID.—AMOUNT OF RECOVERY—POLICY OF OTHER STATES—ABSENCE OF STATUTORY RESTRICTION.**—Although there are statutory restrictions in other states limiting the amount of recovery in an action for death, such restrictions cannot be considered in this state; but section 377 of the Code of Civil Procedure having been enacted after such statutes were in existence, is a direct determination of the legislature of this state that the policy adopted by other states should not exist here.

**ID.—MEASURE OF DAMAGES—LIFE ANNUITY—PROVINCE OF JURY—RESTRICTION OF JUSTICE.**—The legislature has not declared the money value of a life annuity in favor of the deceased to be the measure of damages in an action for death, but has determined to leave the subject of the amount of damages at large, to be determined by the jury, with the single restriction that the damage allowed should be just, under all the circumstances of the case.

**ID.—REFUSAL OF INSTRUCTION—VALUE OF LIFE EXPECTANCY—OMISSION OF MATERIAL ELEMENTS.**—A proposed instruction asked by the defendant, to the effect that the jury should have awarded the present value to the plaintiffs of the principal of a life annuity in favor of the deceased wife and mother, was properly refused, without regard to whether such value is a correct measure of damages, upon the ground that the instruction failed to set forth, as limiting elements, the facts that the husband's life expectancy was less than that of the wife, and that as to him the value of the annuity upon the life of the deceased should only continue during his life expectancy; and that the value of the mother's life to the children becomes less, in law, upon their attaining majority; and that no evidence was given of the life expectancy of the minors.

**ID.—PECUNIARY INTEREST OF ADULT CHILDREN IN LOSS OF MOTHER—INSTRUCTION.**—The statute does not limit the right to prosecute an action for death, or to recover damages, to minor children or minor heirs; and where the evidence tending to show an injury to the children, resulting from the loss of their mother, consisted of proof of her care and labor bestowed upon them, her education, her character, her ability to train and guide them, and her efforts for their welfare, the jury are authorized to draw such conclusions from the evidence as their intelligence, experience, and observation may justify; and it is not error for the court to instruct them that the pecuniary interest of children in the lives of their parents does not necessarily end with their arrival at the age of majority, but that they may allow for the probable loss of any benefit, if any, of a pecuniary value, which a child would probably receive from its mother after arrival at majority.

**ID.—RIGHTS OF MINOR PLAINTIFFS—"HEIRS" OF WIFE AND MOTHER—CONSTRUCTION OF CODE—COMMUNITY PROPERTY—COMMON LAW.**—Section 337 of the Code of Civil Procedure, giving a right of action for a death caused by negligence to the "heirs or personal representatives" of the deceased, is not intended to limit the damages recoverable to the community relation in which the husband is the only heir of the wife; but the word "heirs" is used in its common-law sense, and denotes those who are capable of inheriting from the deceased person generally, without reference to the distribution of community property.

**ID.—DAMAGES TO HEIRS OF WIFE NOT COMMUNITY PROPERTY—SUCCESSION—RIGHTS OF HUSBAND.**—The damages allowed to heirs for the death of a wife and mother have no existence prior to her death,



and are not community property; and the husband's right to recover them is not based upon the supposition that they are a part of her estate, or passed to him under the statute relating to the succession or inheritance of property.

**ID.—RECOVERY LIMITED TO INJURIES TO PLAINTIFFS.**—The recovery in an action for death is for the injuries inflicted upon the plaintiffs, and not for the injuries inflicted upon the deceased.

**ID.—JOINDER OF PARTIES—APPEARANCE BY HUSBAND AS GUARDIAN AD LITEM OF MINORS—INTEREST IN JUDGMENT.**—All of the heirs may be joined as parties in an action for the death of a wife and mother, and the fact that the husband is a party individually, and that the minors also appeared by him as their guardian *ad litem*, does not affect their interest in the judgment, nor vest any part thereof, or any interest therein, in the guardian *ad litem*; and it is no ground of objection to the verdict and judgment that it runs in favor of the husband as an individual and also as guardian *ad litem* of the minors.

**ID.—NEGLIGENCE OF ELECTRIC RAILROAD COMPANY—RUNAWAY OF CAR—INSUFFICIENT CARE AT SWITCH—ACCIDENTAL FALL OF MOTORMAN.**—It is conclusive evidence of negligence for an electric railroad company to put but one man in charge of a car in passing a switch at a place where one man is required at each end of the car; and it is also negligence for the one man put in charge of the car not to stop the car to adjust the trolley in going around a curve over a switch upon a hill, where it appears that the accident occurred through the running away of the car, and its leaving the track in going down the hill with no one in charge, by reason of his having fallen to the ground in attempting to return to his position on the front platform, after having left it to adjust the trolley, and being rendered thereby unable to catch the car; and his accidental fall to the ground, under such circumstances, cannot render the injuries to the passengers the result of an unavoidable accident or inevitable casualty.

**APPEAL** from a judgment of the Superior Court of Alameda County and from an order denying a new trial. F. W. HENSHAW, Judge.

The facts are stated in the opinion.

*Chickering, Thomas & Gregory, R. M. Fitzgerald, and Carl H. Abbott, for Appellant.*

The jury were obliged to reduce all the circumstances of the case to a pecuniary standard, eliminating damages for sorrow and mental anguish, and any *solatium* for wounded feelings, and to give no more damages than, under all the circumstances of the case, were just. (Code Civ. Proc., 377; *Beeson v. Green Mountain etc. Co.*, 57 Cal. 20; *Morgan v. Southern Pac. Co.*, 95 Cal. 510;

29 Am. St. Rep. 143.) The damages are so large and disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate discretion of the jury. (*Klemm v. New York Cent. etc. R. R. Co.*, 28 N. Y. Supp. 861, 863; *Morgan v. Southern Pac. Co.*, *supra*; *Wheaton v. North Beach etc. R. R. Co.*, 36 Cal. 591; *Kinsey v. Wallace*, 36 Cal. 462, 480; *Tarbell v. Central Pac. R. R. Co.*, 34 Cal. 616, 623; *Aldrich v. Palmer*, 24 Cal. 513; *McIntyre v. New York Cent. R. R. Co.*, 47 Barb. 515; *Phelps v. Cogswell*, 70 Cal. 201; *Vaughn v. California Cent. Ry. Co.*, 83 Cal. 18; *St. Louis etc. Ry. Co. v. Robbins*, 57 Ark. 377; *Rose v. Des Moines etc. Ry. Co.*, 39 Iowa, 246, 254; *McAdory v. Louisville etc. Ry. Co.*, 94 Ala. 272; *Gulf etc. Ry. Co. v. Johnson*, 1 Tex. Civ. App. 103; *Nickerson v. Bigelow*, 62 Fed. Rep. 900; *Carpenter v. Buffalo etc. R. R. Co.*, 38 Hun, 116; *Chicago etc. Ry. Co. v. Bayfield*, 37 Mich. 204, 215; *Potter v. Chicago etc. Ry. Co.*, 22 Wis. 615.) Damages are excessive when the sum would purchase an annuity, for the term of expectancy of the life of the deceased, which annuity is in excess of the earnings or services of the deceased. (*Houston etc. Ry. Co. v. Cowser*, 57 Tex. 293; *McAdory v. Louisville etc. Ry. Co.*, *supra*; *St. Louis etc. Ry. Co. v. Robbins*, *supra*; *Nickerson v. Bigelow*, *supra*; *The Oceanic*, 61 Fed. Rep. 363.) The courts of this state should be influenced by limits prescribed by statute in other states as to the amount of damages that can be recovered. (*The Oceanic*, *supra*.) The lower court erred in refusing to instruct the jury that they should not find in such a sum as would produce a fixed income equivalent to the value of the services of deceased for the term of expectancy of her life, and leave the principal remaining untouched in the hands of the plaintiffs at the end of that term. (*Nickerson v. Bigelow*, *supra*; *Houston etc. Ry. Co. v. Cowser*, *supra*; *McAdory v. Louisville etc. Ry. Co.*, *supra*; *St. Louis etc. Ry. Co. v. Robbins*, *supra*; *Louisville etc. Ry. Co. v. Trammell*, 93 Ala. 350.) The right of action in this case springs out of the community relations created between husband and wife by

the laws of this state, and the husband is the only heir who can maintain the action. (Code Civ. Proc., sec. 377; Civ. Code, secs. 162-64, 687, 1383-1401; *Beeson v. Green Mountain etc. Co.*, *supra*; 3 Am. & Eng. Ency. of Law, 354, tit. Community; *McFadden v. Santa Ana etc. Ry. Co.*, 87 Cal. 467, 468; *Tell v. Gibson*, 66 Cal. 247; *Henderson v. Kentucky etc. R. R. Co.*, 86 Ky. 389; *Jordan v. Cincinnati etc. R. R. Co.*, 89 Ky. 40; N. Y. Code Civ. Proc., secs. 1870, 1902, 1905; Ohio Rev. Stats., secs. 6134, 6135, as amended by act of April 13, 1880; Tiffany on Death by Wrongful Act, 36.)

*Hall & Earl*, for Respondents.

The verdict was not excessive. (*Cook v. Clay Street Hill R. R. Co.*, 60 Cal. 604; *Nehrbas v. Central Pac. R.R. Co.*, 62 Cal. 320; *Harkins v. Pullman Palace Car Co.*, 52 Fed. Rep. 724; *Texas Pac. Ry. Co. v. Geiger*, 79 Tex. 13; *Bertha Zinc Co. v. Black*, 88 Va. 303; *St. Louis etc. Ry. Co. v. Johnston*, 78 Tex. 536; *McDermott v. Iowa Falls etc. Ry. Co.*, Iowa, Jan. 24, 1891; *Texas etc. Ry. Co. v. Robertson*, 82 Tex. 657; 27 Am. St. Rep. 929; *Missouri Pac. Ry. Co. v. Lehmberg*, 75 Tex. 61.) This court will not interfere with the verdict of the trial jury, unless it be manifest at the first blush that the verdict was given under the influence of passion or prejudice. (*Aldrich v. Palmer*, 24 Cal. 516; *Boyce v. California Stage Co.*, 25 Cal. 473; *Wheaton v. North Beach etc. R. R.*, 36 Cal. 591; *Harris v. Zazone*, 93 Cal. 72.) The instruction proposed by the appellant, relating to the basis of computation of damages to Mr. Redfield by the death of his wife, was properly refused, as it was ambiguous and did not take into consideration his expectancy of life. (*Louisville etc. Ry. Co. v. Wright*, 134 Ind. 509; *Balch v. Grand Rapids etc. R. R. Co.*, 67 Mich. 394; *Wheelan v. Chicago etc. Ry. Co.*, 85 Iowa, 167.) The instruction as to the damage sustained by the children was properly given. Children have a pecuniary interest in the lives of their parents, which may extend beyond their minority, and even an adult may recover damages for the death of the parent.

(Code Civ. Proc., sec. 377; *Cederberg v. Robison*, 100 Cal. 93; *Lockwood v. New York etc. R. R. Co.*, 98 N. Y. 523; *McIntyre v. New York Cent. R. R. Co.*, 37 N. Y. 287; *Tilley v. Hudson River R. R. Co.*, 29 N. Y. 252; *Tuteur v. Chicago etc. R. R. Co.*, 77 Wis. 505; *Railroad Co. v. Barron*, 5 Wall. 90; *Petrie v. Columbia etc. R. R. Co.*, 29 S. C. 303; *Galveston etc. Ry. Co. v. Kutac*, 72 Tex. 643.) The word "heirs," as used in section 377 of the Code of Civil Procedure, includes the children. (*Munro v. Pacific etc. Reclamation Co.*, 84 Cal. 515; 18 Am. St. Rep. 248; *Hartigan v. Southern Pac. Co.*, 86 Cal. 142.) The damages recovered were not the product of the community relation existing between the husband and wife, and the word "heirs" does not refer to those persons who would succeed to the money if it had been community property at the time of the death of Mrs. Redfield. (Civ. Code, sec. 1401; *Estate of Rowland*, 74 Cal. 525; 5 Am. St. Rep. 464; *Carrithers v. Cox* (Ky., Oct. 30, 1890), 14 S. W. Rep. 599.)

HAYNES, C.—The defendant, the Oakland Consolidated Street Railway Company, operated an electric street-car line between the city of Oakland and Mountain View Cemetery.

On May 6, 1893, Adeline B. Redfield and her children, Lowell M. Redfield and Mattie A. Redfield, got upon one of the defendant's cars at or near Mountain View Cemetery to return to the city of Oakland. This car was operated by only one man, as was customary upon that line. The car in question had a solid glass partition separating the body of the car, in which the seats were, from the platforms at each end, which were intended for the motorman; and the only way the motorman could pass from one end of the car to the other was along the step on the outside of the car.

From the cemetery the track runs toward the city for some distance on a practically level grade; then ascends a grade to the summit of a hill, at a switch, which is the highest point of the track. From that point the

track descends. On the summit of the hill the track is comparatively straight for about thirty-five feet. From the switch the track descends at a varying grade for a distance of about one-half a mile to Booth street, and then turns to the right, or west.

When the car was going up the hill above mentioned the motorman, who was then upon the front end of the car, jumped off and got on again at the rear end of the car and took hold of the trolley rope to adjust the trolley around a curve over the switch, the car going up the hill slowly. When the switch was reached the motorman had some trouble in putting the trolley on the right wire. In attempting to return to the front platform he fell to the ground, and when he got up he was unable to catch the car, which by this time was going down the hill. The car ran down the hill to the curve, where it left the track and went across the road on one side, until it struck the gutter, when it righted itself and flew across a field until it stopped. Said Adeline B. Redfield in some way struck her head and fell off the car after it left the track, and received such injuries that she died therefrom on the twenty-ninth day of June, 1893.

This action is prosecuted by her husband, Horace A. Redfield, and her two minor children for the recovery of damages. The jury returned a verdict for the sum of fourteen thousand dollars, upon which judgment was entered; and this appeal is from the judgment and also from an order denying the defendant's motion for a new trial.

The points made by appellant will be noticed substantially in the order in which they are presented in its brief.

1. "The damages are excessive. The sum of fourteen thousand dollars is so large, in view of the law of the case and the instructions of the court, that it conclusively appears to have been given under the influence of passion or prejudice."

This action is brought under section 377 of the Code of Civil Procedure, which is as follows: "When the death

of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section such damages may be given as under all the circumstances of the case may be just."

Appellant's contention as to the true mode of ascertaining the amount of damages to be awarded in cases such as this is stated in an instruction requested by appellant to be given to the jury, as follows: "If you find for the plaintiffs, you must find in such amount as shall to you seem just, considering the present worth of the life of the deceased to the plaintiffs; that is to say, you must not find any such sum as would produce a given income for the time fixed, the principal remaining on hand at the end of that time, but the present value of such principal, that is, what it would be worth to-day. It is shown by the American experience tables of mortality that a person aged thirty-five years would probably live thirty-one and eight-tenths years longer. You must determine the present value of that life, and not find any such sum as would produce a fixed income for the supposed term of life and leave the principal in the hands of the plaintiffs at the expiration of that time; but, you must find the present value of that amount and render the verdict accordingly."

Mrs. Redfield, at the time of her death, was thirty-five years of age, and was the wife of the plaintiff Horace A. Redfield, and the mother of plaintiffs Lowell A. Redfield and Mattie A. Redfield. Her expectancy of life was thirty-one and eight-tenths years, and the expectancy of life of her husband was twenty-nine and sixty-two one-hundredths years. The children were aged twelve and eleven years, respectively. She was an educated lady, a graduate of Field's Seminary. The testimony shows that she was competent to give lessons and in-

struct her children upon the piano and in vocal music; was a thorough housekeeper; did all her own work; made all the clothing, including the trimming of hats and bonnets, for her children and herself; took pains in directing the education of her children; cared for them when they were sick; and looked after the comfort of her husband as well. The testimony further shows that she was devoted to her children, was extremely solicitous in regard to their care, and was constantly watchful of their conduct and the training of them morally as well as otherwise.

It is true that in all such cases it is difficult to fix the definite money value of the services of such a wife and mother. Precise accuracy in that regard is not capable of being attained either by a court or jury. In eleven states the amount of damages that can be awarded for the death of a person is limited to five thousand dollars, in one state to seven thousand dollars, and in eight states and territories, including the District of Columbia, it is limited to ten thousand dollars. In this state there is no statutory restriction or direction except the general statement that "such damages may be given as under all the circumstances may be just." In those states where the amount of the recovery is limited it may, or it may not, happen that just compensation is made, inasmuch as circumstances would often occur which would make the maximum amount far less than a just compensation.

It is contended by appellant that so many states have determined that it is wise to limit the amount that can be recovered as damages, in cases like the present, that we should look to such limitations in determining the amount to be recovered, and be governed thereby; but such statutes were in existence long before section 377 of the Code of Civil Procedure was enacted, and this provision of the code is a direct determination of our legislature that the policy adopted by other states in that regard should not exist here. So, too, it may be said that while such sum as would purchase an annuity

equal to the money value of the life and services of the deceased would give an exact measure of the damages sustained by the survivor or survivors, the legislature has not seen proper to declare that to be the measure of damages in such cases, but has determined to leave the subject of determining the amount at large, with the single restriction that the damages allowed should be just under all the circumstances of the case.

That, as a general rule, such questions can be better determined by a jury than by the court is generally conceded; and our statute has limited the power of the court over the verdicts of juries in such cases.

Section 657 of the Code of Civil Procedure provides that the verdict or other decision may be vacated, and a new trial granted, for any of the following causes materially affecting the substantial rights of such party: "5. Excessive damages appearing to have been given under the influence of passion or prejudice."

In *Morgan v. Southern Pac. Co.*, 95 Cal. 501, 508, this court said: "The amount of the verdict is certainly quite large—larger than we, if sitting as a jury, would have felt it our duty to give. But that consideration alone is not sufficient to warrant us in disturbing the verdict. There is no absolute rule in such a case; and about all that can be safely said on the subject may be found in the opinion of the court in *Aldrich v. Palmer*, 24 Cal. 513, and the cases there cited. The general conclusion, as nearly as can be formulated, is as there stated, namely: that a verdict will not be disturbed because excessive, unless the amount of the damages is obviously so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate discretion of the jury."

We are unable to say, after a careful review of the testimony, that the damages awarded by the jury "appear to have been given under the influence of passion or prejudice"; and such appears to have been the conclusion of the learned trial judge who denied appellant's motion for a new trial.



It is not necessary to review the very large number of authorities cited by appellant as to the mode of estimating the value of a life, since if we were to apply that rule we would be compelled to place ourselves in the position of jurors, and pursue an independent investigation for the purpose of determining the annual value to the plaintiffs of the life of the deceased, and upon that basis determine the sum required to purchase an annuity which should equal the annual value of the life of the deceased. This we do not feel called upon to do, at least in the absence of a conviction based upon all the facts of the case that the jury were influenced by passion or prejudice in fixing the amount of damages awarded the plaintiffs.

2. The refusal to give defendant's proposed instruction above quoted was not error. The contention of appellant as to the measure and amount of damages is that the jury should have awarded such a sum as, invested in an annuity, would have yielded to the husband and to the children an income which would be the fair equivalent to them of the monetary value of the life of the dead wife and mother. Conceding for the purposes of this discussion only, and not deciding that this is a correct rule, it is at once apparent that the elements of which such a measure would be composed are the expectancies of life: 1. Of the wife; 2. Of the husband; and 3. Of each of the children. In other words, the annuity in no event should continue longer than the life expectancy of the wife. If the husband's expectancy was less than hers, then, as to him, it should continue only during that expectancy; and so as to the annuity of the children. In addition, the value of the mother's life to the children becomes less in law upon their attaining majority. Each of these considerations, therefore, becomes essential to a proper determination under appellant's rule. Yet a reading of the instruction discloses that it fails to set them forth. The expectancy of life of the husband and children is not brought into the calculation, nor the time when the

minority of the children would cease. Moreover, the record discloses no evidence given of the life expectancy of the minors. The proposed instruction, therefore, was radically defective even under appellant's theory, and was therefore properly refused.

3. It is contended that the court erred in giving the following instruction: "The pecuniary interest of children in the lives of their parents does not necessarily end with their arrival at the age of majority; but you may allow for the probable loss of any benefit, if any, of a pecuniary value which the child would probably receive from its mother after its arrival at majority." This instruction was given as a part of the general instruction above quoted. We see no error in this instruction. Immediately preceding the instruction last above quoted, the jury were instructed as follows: "And so, in determining the amount of damages to the children, you have a right to consider the value of the nurture and instruction, moral and physical, and intellectual training, if any, which the mother gives to the children; and, in determining such value, you are not limited to a case of similar services rendered by a hired servant, but may take into consideration the value of such services when rendered by the mother to her children, having regard to the evidence in this case, if there be any, as to the ability and willingness of the deceased to nurture, care for, train, and educate her children."

It is contended, however, that no special or any circumstances were shown which would cause the children to depend upon their mother after they arrived at majority, or that after that time they would suffer loss from her death. It is true that the only evidence which tended to show an injury to the children resulting from the loss of the mother was her care and labor bestowed upon them, her education, her character, her ability to train and guide them, and efforts for their welfare; and, in applying such testimony, the jury were authorized to draw such conclusions therefrom as their intelligence, experience, and observation should justify.

Nor are we prepared to say that her intelligent care and assistance would be less valuable to them at the critical period of their lives when they are about to enter, or have entered, upon a more or less distinct and separate life, after attaining their majority. Besides, the statute does not limit the right to prosecute the action, or to recover damages, to minor children or minor heirs.

4. But it is contended by appellant that the minor plaintiffs are not entitled to recover damages at all; that section 377 of the Code of Civil Procedure gives a right of action in such cases only to the "heirs or personal representatives," and that in this state, where community property is recognized, the husband is the only heir of the wife, and that the damages recoverable are based entirely upon such community relation.

This point was not made in the court below. Section 430 of the Code of Civil Procedure specifies as one of the grounds of demurrer "a defect or misjoinder of parties plaintiff or defendant"; and section 434 provides that if no objection be taken, either by demurrer or answer, upon the grounds stated in section 430, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and that the complaint does not state facts sufficient to constitute a cause of action. Nor was any objection or exception taken to evidence upon the trial tending to prove damages sustained by the children. If the record, in any manner, presents the question, it is upon a general exception to certain instructions given to the jury, and which exceptions give no hint of the point now made, though possibly broad enough to include it.

We think, however, that appellant is mistaken in its construction of section 387 of the Code of Civil Procedure. The damages recoverable are not the product of the community effort or of community accumulations; nor does the word "heirs," as there used, refer to

those persons who would succeed to the money so recoverable if it had been in the possession of the community as community property at the time of Mrs. Redfield's death; but the word is used in its common-law sense, and denotes those who are capable of inheriting from the deceased person generally, and without the limitation resulting from statutes relating to the distribution of community property. It is true that, under section 1401 of the Civil Code, upon the death of the wife the entire community property, without administration, belongs to the surviving husband (with certain exceptions not affecting this question), but the damages here sought to be recovered arose upon Mrs. Redfield's death, and in consequence thereof, and had no existence prior to her death, and the husband's right to recover them is not based upon the supposition that they were a part of her estate which existed even a moment before her death; but his claim to damages is for an injury personal to himself, and not for injuries inflicted upon the wife, and which passed to him under the statute relating to the succession or inheritance of property. Her personal representative might have maintained the action; but, in such case, the damages recovered would not have belonged to her estate, nor been liable for her debts; and the same thing would be true if the husband had died from similar injuries, and the recovery had been obtained by his personal representative. The recovery is for the injury inflicted upon the plaintiffs personally, and not for injuries inflicted upon her; and the word "heirs" in the statute is intended to limit the right of recovery to a class of persons who, because of their relation to the deceased, are supposed to be injured by her death. *Tell v. Gibson*, 66 Cal. 247, and *McFadden v. Santa Ana etc. Ry. Co.*, 87 Cal. 467, were actions to recover damages for personal injuries to the wife not resulting in death, and have no application to the question before us.

5. It is also contended that the verdict and judgment is against law, in that the judgment cannot run in favor

of Horace A. Redfield as an individual, and also as guardian *ad litem* of the minors.

*Dias v. Phillips*, 59 Cal. 293, cited by appellant, has no application here. That was an action brought by the plaintiff as an individual, and also in his capacity as an executor. There is no authority of law for such joinder. But here the statute authorized the action to be brought by the "heirs," no matter how many there may be. The fact that the minors appeared by a guardian *ad litem*, as they were compelled to do, does not affect their interest in the judgment, nor vest any part of or interest in it in the guardian *ad litem*.

6. It is also contended "that the evidence shows that the injury complained of was the result of an unavoidable accident and inevitable casualty," and that, therefore, the evidence was insufficient to justify the verdict. The fact that, in passing the switch, the attention of one man was required at each end of the car, and that one man could not be at both ends at the same time, conclusively shows negligence on the part of the defendant in putting but one man in charge of the car to perform both duties. Or if, on the other hand, the man in charge could have stopped the car by shutting off the power, and changed the trolley to the proper wire, it was negligence for him to leave the motor with the power on, and the car in motion, to go to the other end of the car to adjust the trolley. The fall of the motor-man, while attempting to return to the front platform, was accidental; but it was not accidental that but one man was put in charge of the car when two were required, or that the one man did not stop the car to adjust the trolley, if the adjustment could be made in that way. The fact that for some months one man had operated the car without accident does not show the absence of constant danger, while the circumstances under which the accident occurred shows that it might have occurred many times, and that it was a constant and continuing negligence to operate the car with but one man in charge.

We find no ground upon which the judgment and order appealed from should be reversed, and advise that they be affirmed.

SEARLS, C., and VANCLIEF, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

HARRISON, J., GAROUTTE, J., VAN FLEET, J.

Hearing in Bank denied.

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[No. 15820. Department Two.—December 6, 1895.]

**JUAN B. CASTRO, APPELLANT, v. JOSEFA S. GEIL  
ET AL., RESPONDENTS.**

**QUIETING TITLE—CROSS-COMPLAINT—FRAUDULENT DEED—UNDUE INFLUENCE—UN SOUND MIND—PLEADING—STATUTE OF LIMITATIONS—DISCOVERY.**—In an action to quiet title against the heirs of plaintiff's grantor, a cross-complaint alleging that the deed under which the plaintiff claims was obtained by undue influence at a time more than ten years prior to the filing of the cross-complaint, when the grantor was, from disease, old age, ignorance, weakness of mind and body, and from such undue influence, mentally incompetent to manage her property, or to transact any business, and that she was then and for a long time prior thereto had been of unsound mind, and seeking to cancel the deed, but which does not allege any date at which the fraud and undue influence was discovered, is subject to a demurrer upon the ground that the cause of action therein stated is barred by the provisions of subdivision 4 of section 338 of the Code of Civil Procedure.

**ID.—ALLEGATION OF DISCOVERY NECESSARY.**—In an action to set aside a deed on the ground of fraud, when the acts constituting the fraud occurred more than three years before the commencement of the action, the plaintiff must allege the discovery thereof within three years, in order to avoid the bar of the statute.

**ID.—DEED—UN SOUND MIND OF GRANTOR—VESTING OF TITLE—VOIDABILITY—PLEADING—LIMITATION OF ACTION.**—A deed of a person of unsound mind, who is not under guardianship, vests a title, and is merely voidable, and not void; and the title cannot be divested otherwise than by judicial action, or the voluntary conveyance of the grantee; and in an action to avoid it, the complaint must show upon its face that the action is not barred by the statute of limitations.

**ID.—EQUITY CASES—STATUTE OF LIMITATIONS—LACHES.**—The statute of limitations relating to a cause of action for relief upon the ground of fraud applies to equity cases; and where the statute is applicable the doctrine of laches, as applied in equity, need not be considered.

**ID.—RUNNING OF STATUTE—MINOR HEIRS—SUBSEQUENT DISABILITY.—**

Where the parents, through whom minor heirs claim, were in life when the statute of limitations began to run against a cause of action to set aside a conveyance for fraud and undue influence, the subsequent disability of the minor children who were not heirs of the grantor when the deed was made does not stop the running of the statute, which commenced to run against their parents.

**APPEAL** from a judgment of the Superior Court of Monterey County and from an order denying a new trial. N. A. DORN, Judge.

The facts are stated in the opinion.

A. Craig, W. H. Webb, and J. A. Johnson, for Appellant.

The demurrer to the cross-complaint should have been sustained, as the cross-complaint shows that the fraud was perpetrated about ten years before the cross-complaint was filed, and it does not contain an allegation that the fraud was discovered within three years before it was filed. (Code Civ. Proc., sec. 338; *People v. Blankenship*, 52 Cal. 619; *Sublette v. Tinney*, 9 Cal. 423; *Duff v. Duff*, 71 Cal. 529; *Watkins v. Bryant*, 91 Cal. 503; *People v. Noyo Lumber Co.*, 99 Cal. 461; *Cameron v. San Francisco*, 68 Cal. 391; *Humphreys v. Mattoon*, 43 Iowa, 556; *Bishop v. Knowles*, 53 Iowa, 268; *Gebhard v. Sattler*, 40 Iowa, 152; *Laird v. Kilbourne*, 70 Iowa, 83.) The statutes once set in motion continues to run, notwithstanding subsequent disabilities. (*Thompson v. Smith*, 7 Serg. & R. 209; 10 Am. Dec. 453, and note; *Dorland v. Hanson*, 81 Cal. 202; 15 Am. St. Rep. 44; *Tynan v. Walker*, 35 Cal. 634; 95 Am. Dec. 152; *Piper v. Hoard*, 107 N. Y. 67; 1 Am. St. Rep. 789.)

S. F. Geil, and John J. Wyatt, for Respondents.

A general demurrer addressed to the whole of a complaint should be overruled if some portion of the complaint states a cause of action. (*Fleming v. Albeck*, 67 Cal. 226; *Hulsman v. Todd*, 96 Cal. 228, and cases cited.)

**HAYNES, C.**—This action was brought by the plaintiff to quiet his title to a lot in the town of Monterey.

On December 14, 1882, Maria Antonia Pico de Castro, the mother of plaintiff, executed a deed purporting to convey said property to the plaintiff in fee simple. The deed was duly acknowledged, and two days thereafter was recorded. Said Maria Antonia Pico de Castro died December 12, 1883, intestate. The defendants, claiming as heirs at law of said intestate, answered the complaint, and, at the same time, filed a cross-complaint alleging "that at the time said Maria Antonia Pico de Castro signed said deed she was, from disease, old age, ignorance, weakness of mind and body, and from the undue influence and control exercised over her by said Juan B. Castro, mentally incompetent to manage her property, or of transacting any business whatever, and was then and there incapable to comprehend or understand, and in fact did not comprehend or understand, the character, nature, or effect of said transaction," and that she was then, and for a long time prior thereto had been of unsound mind. Defendants further alleged that said Maria Antonia Pico de Castro died intestate on December 12, 1883, leaving surviving her, as next of kin and her only heirs entitled to inherit the premises described in the complaint, the plaintiff and the defendants; that as between the parties to the action the plaintiff was entitled to an undivided thirty-sixtieths thereof, and the several defendants, in different proportions therein stated, the remainder thereof; and prayed that said deed be set aside and canceled, and that the parties to this action be declared to be the owners in fee of said premises in the proportions above set forth, and that the plaintiff be required to convey to the defendants their said interest.

The plaintiff demurred to said cross-complaint upon the grounds: 1. That said cross-complaint does not state facts sufficient to constitute a cause of action; and 2. That the cause of action therein stated is barred by the provision of subdivision 4 of section 338 of the Code of Civil Procedure. This demurrer was overruled, and plaintiff answered the cross-complaint, putting in issue



all the material allegations thereof. The cause was tried upon the cross-complaint and the answer thereto, and findings and judgment were in favor of defendants, and this appeal is by the plaintiff from said judgment and an order denying his motion for a new trial. The demurrer should have been sustained.

Section 338 of the Code of Civil Procedure limits the time within which the actions there enumerated shall be commenced to three years. Subdivision 4 of said section is as follows: "4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

In *People v. Blankenship*, 52 Cal. 619, it was held that: "When the acts constituting the fraud occurred more than three years before the commencement of the action, the plaintiff must allege the discovery thereof within three years in order to avoid the bar of the statute." That was an action to set aside a deed on the ground of fraud, and it was held the demurrer should have been sustained. (See, also, *People v. Noyo Lumber Co.*, 99 Cal. 459, 460; *Boyd v. Blankman*, 29 Cal. 19; 87 Am. Dec. 146.)

The cross-complaint alleges that the deed from Maria Antonia Pico de Castro to appellant was made on December 14, 1882, and that she died December 12, 1883. This cross-complaint was filed April 5, 1893, or more than ten years after the execution of the deed, and it contains no averment as to the date at which the alleged fraud and undue influence of appellant was discovered. It is contended by respondents, however, that it is alleged that at the time said deed was executed, and for a long time prior thereto, said grantor had been of unsound mind, and that therefore the deed was void "without regard to any fraud or undue influence"—meaning thereby that the deed was wholly inoperative, and did not convey to or vest in appellant any title or seisin.

"The deed of a person *non compos mentis*, who is not

under guardianship, transfers a seisin and is merely voidable." (Devlin on Deeds, sec. 73, and cases cited in note 4.) To the same effect are the provisions of our Civil Code, section 38: "A person entirely without understanding has no power to make a contract of any kind, but he is liable for the reasonable value of things furnished to him necessary for his support or the support of his family."

"SEC. 39. A conveyance or other contract of a person of unsound mind, but not entirely without understanding, made before his incapacity has been judicially determined, is subject to rescission, as provided in the chapter on rescission of this code"; and section 40 provides: "After his incapacity has been judicially determined, a person of unsound mind can make no conveyance or other contract, nor delegate any power, or waive any right, until his restoration to capacity." In *More v. Calkins*, 85 Cal. 177, 190, it was said: "I think the demurrer to the second cause of action attempted to be stated in the complaint, based upon sections 38 and 39 of the Civil Code, was properly sustained. That A. S. More was 'entirely without understanding' is not directly or indirectly, definitely or indefinitely, stated in the complaint, and therefore the instrument executed by him was not void."

This language applies with equal force and propriety to the case before us. It is, therefore, conclusively settled that the deed in question vested the title in appellant, and that it could not be divested otherwise than by judicial action, or the voluntary conveyance of the grantee; and if by judicial action, that the complaint must allege facts which show upon the face of it that the action is not barred by the statute of limitations.

The doctrine of laches, as applied in equity, need not be considered, as the statute of limitations here invoked applies to equity cases. (*Boyd v. Blankman, supra*; *Broderrick Will case*, 21 Wall. 503, 520.)

Respondents also contend that some of them are minors, and that they are not affected by the statute of

limitations. But the cross-complaint shows that these minors were not heirs of appellant's grantor when the deed was made, their parents, through whom they claim, being then, and for years afterward, in life; and subsequent disabilities do not stop the running of the statute. (*Alvarado v. Nordholt*, 95 Cal. 116; *McLeran v. Benton*, 73 Cal. 329; 2 Am. St. Rep. 814.)

It follows that the judgment and order appealed from should be reversed, with directions to sustain said demurrer, and with leave to all parties to amend their pleadings if they shall be so advised.

SEARLS, C., and BELCHER, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, with directions to the court to sustain said demurrer, with leave to all parties to amend their pleadings as they may be advised.

McFARLAND, J., TEMPLE, J., HENSHAW, J.

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[S. F. No. 49. Department Two.—December 6, 1895.]

MAX M. LEVY, RESPONDENT, v. MAGNOLIA LODGE,  
No. 29, I. O. O. F., APPELLANT.

ODD FELLOWS—EXPULSION OF MEMBER FOR CONTEMPT—RESTORATION—MANDAMUS.—Where a member, who signed the written constitution and by-laws of an Odd Fellows' lodge, has been expelled, in accordance with the provisions of the by-laws, for a violation thereof on his part, and for contempt in refusing to appear before a committee appointed to try charges against him, in pursuance of the constitution and by-laws of the lodge, *mandamus* will not lie to restore him to membership.

ID.—RIGHT TO SICK BENEFITS—REMEDY IN LODGE—JURISDICTION OF COURTS—DEFENSE.—Although the courts have jurisdiction to hear and dispose of a complaint against a lodge for refusal to allow sick benefits, yet, where the laws of the lodge provide a remedy for the grievance complained of, that remedy must first be pursued and exhausted; and the failure to pursue that remedy is a perfect defense to an action in any state court.

ID.—SPECIFICATION OF CHARGES AGAINST MEMBER.—The charges against a member of a lodge for a breach of its laws are sufficiently specific when they apprise the member of the nature of the charges, and enable him to prepare for his defense.

**ID.—CONTRACT OF MEMBER—WAIVER OF RIGHT TO OBJECT TO REPORT OF COMMITTEE—DEFAULT—CONCLUSIVENESS OF REPORT.**—A member who has signed the by-laws of a lodge, which provide that a member may be expelled for contempt in failing to appear before a committee to stand trial upon charges, and that in such case the report of the committee shall be conclusive, waives any right of objection to the report of the committee, by intentional default in refusing to appear before it to answer to the charges made against him.

**ID.—UNREASONABLE BY-LAW—WAIVER OF OBJECTION BY CONTRACT.**—What might be bad or unreasonable as a by-law, as being against common right, may be good as a contract; and a man may part with or waive a common right voluntarily, of which it would be impolitic and unjust to deprive him by a by-law passed without his assent.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. **J. M. SEAWELL**, Judge.

The facts are stated in the opinion.

*Marcus Rosenthal*, for Appellant.

Courts will not interfere at all in the proceedings or affairs of a society where there are no civil or property rights involved. (Niblack's Voluntary Societies, 218; *Otto v. Journeyman Tailors' etc. Union*, 75 Cal. 314; 7 Am. St. Rep. 156; *People v. Masonic Ben. Assn.* 98 Ill. 635; *Rigby v. Connol*, 28 Week. Rep. 650; 14 L. R. Ch. Div. 482; *Ellison v. Bignold*, 2 Jac. & W. 503.) A member must seek his remedies before the tribunal established by the order. (*McAlees v. Order of Iron Hall* (Pa., April 23, 1888), 13 Atl. Rep. 755; *Black etc. Soc. v. Van Dyke*, 2 Whart. 309; 30 Am. Dec. 263; *Toram v. Howard etc. Assn.*, 4 Pa. St. 519; *Anacosta Tribe of Red Men v. Murbach*, 13 Md. 91; 71 Am. Dec. 625; *Osceola Tribe, I. O. R. M. v. Schmidt*, 57 Md. 98; *Dolan v. Court Good Samaritan*, 128 Mass. 439; *Robinson v. Irish etc. Soc.* 67 Cal. 135; *Lafond v. Deems*, 81 N. Y. 514.) Where there are appellate tribunals established by the order he cannot resort to the courts until, upon appeal, it has refused to give relief. (*Poultney v. Bachman*, 31 Hun, 54; *Lafond v. Deems*, *supra*; *White v. Brownell*, 4 Daly, 329; 4 Abb. Pr., N. S., 162.)

*George D. Collins, for Respondent.*

As the defendant, in expelling plaintiff, acted without jurisdiction, it was not necessary for him to resort to the tribunals of the order for redress. (Bacon on Benefit Societies, sec. 107; *Hall v. Supreme Lodge*, 24 Fed. Rep. 454.) The charges presented against plaintiff did not confer jurisdiction to place him on trial. Commencing an action against defendant to recover sick benefits is not made an offense by the by-laws, nor could the mere acts of receiving benefits to which he was not entitled constitute a violation of section 21 of the by-laws. (*Otto v. Journeyman Tailors' etc. Union*, 75 Cal. 308; 7 Am. St. Rep. 156; *Erd v. Bavarian etc. Assn.*, 67 Mich. 233; Bacon on Benefit Societies, sec. 87.)

VANCLIEF, C.—The defendant has appealed from a judgment of the superior court awarding a peremptory writ of mandate commanding defendant to restore the plaintiff to his former *status* as a member of said lodge, from which he had been expelled, and also from an order denying his motion for a new trial.

The material facts of record are as follows: The defendant is a voluntary, unincorporated, fraternal, and beneficial association, organized in the city of San Francisco, and governed by a written constitution and by-laws, signed by all its members. It is subordinate to a higher organization, known as the grand lodge of I. O. O. F. of the state of California, which, in its turn, is subordinate to a sovereign grand lodge.

The constitution of the defendant lodge, section 7, provides that "the constitution, laws, and decisions of the sovereign grand lodge, . . . and the constitution, laws, and decisions of the grand lodge . . . of the state of California, are laws of this lodge, and all persons, by becoming members of this lodge, consent to and agree to abide by the same."

Section 18 of the by-laws of the defendant lodge provides that every member in good standing who has

attained to the third degree "shall, in case of sickness, infirmity, or bodily accident, rendering him unable to earn a livelihood, receive from the lodge fund a weekly benefit of ten dollars, . . . . and in all cases benefits shall only be granted on the recommendation of the noble or vice-grand, subject to the restrictions hereinafter provided, and no benefit shall be paid for a part of a week's sickness, nor for any sickness which is only of one week's duration, nor for any sickness caused by intemperance or immoral conduct."

Section 21 of the by-laws provides: "A member who, though sick or disabled, but who is able to collect debts, settle accounts, to make contracts, to oversee or superintend any business, shall not be entitled to benefits as a matter of right or legal claim; but such member may be granted relief by a vote of the lodge."

Section 6, article IV, of the constitution of the defendant lodge, is as follows:

"SEC. 6. This constitution, and all laws, rules, and regulations providing for the granting of sick, funeral, and other benefits, or of any aid, relief, assistance, allowance, expenses, or money to any member, wife, widow, orphan, or any person whatever, or providing for the payment to the lodge of dues, assessments, and demands by a member, are not intended, and shall not be construed, to create the relation of debtor and creditor, nor to create legal rights, liabilities, nor responsibilities, nor any legal contractual relation, nor confer any right to enforce the granting or payment of the same by resort to courts of law; on the contrary, all questions, whether of law or fact, relative to the granting, payment, or refusal of the same, relate to moral duties or obligations, and not to legal ones, and appertain to the sole jurisdiction of this lodge and the authorities of this order, and their decisions in the premises shall be binding, conclusive, and final upon all members, wives, widows, orphans, or persons. Every person, by becoming or continuing a member of this lodge, consents to, and agrees to, abide by all the laws

and decisions of this lodge and of the authorities of the order."

Plaintiff became a third-degree member of the defendant lodge in November, 1883, and so continued until he was expelled in April, 1894. In 1893 he claimed to be permanently sick, and unable to earn a livelihood, and was so reported to his lodge; and thereupon the lodge commenced to pay him sick benefits at the rate of ten dollars a week; but, after having paid such benefits for a number of months (not specified in the record), the lodge declined to pay plaintiff any further benefit, though he still claimed and demanded them. In this state of his case the constitution of defendant, section 5, article IV, provided for him the following remedies, and no other:

"If a lodge refuses or neglects to grant sick benefits to a brother, he may, at any time within four weeks thereafter, demand in writing that the lodge appoint a committee to investigate the matter, whereupon the lodge shall appoint a committee of five to hear the evidence, and report the facts and their conclusions to the lodge. Such committee shall, without unnecessary delay, notify the brother of the time and place of their meeting, and investigate the case. They shall keep full minutes of the evidence and of their proceedings, and report the same to the lodge with their conclusion. . . . Upon the report being made, notice thereof shall forthwith be given by the secretary to the party against whom the verdict is rendered, and he shall have two weeks in which to file his exceptions; if no exceptions are filed within two weeks, the lodge shall proceed to pronounce its judgment and decision. An appeal from the judgment of the lodge may be taken at any time within two weeks thereafter, to the grand lodge, on questions of law or fact, or both, and if no such appeal is taken, the judgment of the lodge is final. When a bill of exceptions to the report of the committee is filed, as above provided, the lodge may determine upon its merits, and

either change, modify, or sustain the report of the committee, or refer the same back to the same or another committee, or order a new investigation. If the lodge shall deem the exceptions not well taken, it shall proceed to pronounce its judgment and decision. Each witness, at the conclusion of his testimony, and before other proceedings in the case are had, shall have his testimony, as taken down by the committee, read over to him, and shall make such corrections thereof as he may deem proper, and shall thereupon sign each page of said testimony. The brother has the affirmative of the issue; and the committees appointed under this section shall be appointed and governed by the rules applicable to committees upon trials under charges."

In accordance with this section, the plaintiff demanded, in writing, that the lodge appoint a committee to investigate the question as to whether he was entitled to further benefits; whereupon the lodge appointed such committee, and the committee without delay notified plaintiff of their appointment, and also of a time and place when and where they would meet and investigate the matter; and the committee met at the time and place appointed, but the plaintiff refused to meet the committee at that time and place, or at any other time or place, and soon thereafter commenced an action against the defendant, in a justice's court, to recover benefits alleged to be due him, and obtained a judgment for the sum of sixty dollars and costs.

Thereafter, on March 20, 1894, a member of the defendant lodge made and filed in the lodge charges in writing against the plaintiff, specifying that plaintiff had violated his contract with the lodge, and thereby violated the rules and regulations of the lodge and of the grand lodge, by commencing and prosecuting said action in the justice's court; and also that during the year 1893 the plaintiff "claimed and received sick benefits from said lodge to which he was not entitled, thereby defrauding the said lodge, he having violated



section 21 of the by-laws." On the day these charges were made, the lodge, in compliance with its rules, appointed a committee of five members to investigate said charges, and to report the result to the lodge. The committee immediately summoned plaintiff to appear before it on April 3, 1894, at 7 o'clock P. M., to answer said charges, and notified him that in case he made default, he would be reported to the lodge as being guilty of contempt. This summons was served on plaintiff March 21, 1894, by delivering to him a copy thereof attached to a copy of said charges against him.

On March 31, 1894, the lodge received the following:

"MAGNOLIA LODGE, No. 29, I. O. O. F. OF CAL.

"Gents: Being convinced of a total absence of power in your organization to expel a member upon the 'charges' made against Max Levy, I have advised him that any action that you may take against him in that direction will be a nullity, and I therefore, on his behalf, respectfully suggest that you dismiss the 'charges' and proceedings that have been taken in respect thereto, as the entire matter is beyond the scope of your authority.

Yours respectfully,

"GEO. D. COLLINS,

"Attorney for Max Levy."

The lodge took no action on this letter, and the committee met at the hour appointed in the summons, and called the plaintiff and waited for him three hours, but he failed to appear (plaintiff testified that he declined to appear before the committee on the advice of Mr. Collins, his attorney). Thereupon the committee fully reported to the lodge its action and that plaintiff failed to appear, and also their conclusion that plaintiff was guilty of contempt of the authority of the lodge. The lodge adopted the report of the committee, and thereupon, without further notice to plaintiff, expelled him from the lodge; but immediately thereafter served on him the following written notice:

"HALL OF MAGNOLIA LODGE, No. 29, I. O. O. F., ODD FELLOWS' HALL, corner Seventh and Market Sts.,

"SAN FRANCISCO, CAL., April 3, 1894.

"TO MARKS LEVY, City,

"*Dear Sir and Bro:* Please take notice that at the regular meeting of this lodge, held this evening, the committee appointed to try certain charges preferred against you by Bro. E. O. Flanders, P. G., reported you in contempt according to section 5 of article VIII of the constitution, you having failed to appear before it after having been duly subpoenaed, and the lodge adopted the report and you was accordingly expelled from membership in the same.

"Yours in F., L. and T.,

[SEAL]

"SAMUEL POLACK,

"Secretary."

The plaintiff did not except to the report of the committee, nor appeal from the order of expulsion, nor seek any other relief from the lodge; but, instead thereof, commenced this proceeding for a writ of mandate.

Section 5 of article VIII, referred to in the above notice to plaintiff of his expulsion, is included in the following extract from that article, embracing sections 2 to 6, inclusive:

"SEC. 2. Any member who shall violate any of the principles of the order, or offend against the constitution, by-laws, or rules of order of this lodge, or the penal laws of the land, shall be fined, reprimanded, suspended, or expelled, as the by-laws may direct or the lodge determine.

"SEC. 3. Every member shall be entitled to a fair trial for any offense involving reprimand, suspension, or expulsion. No member shall be put upon trial unless charges duly specifying the offense, so as fully to apprise him of the nature thereof, and to enable him to prepare for his defense, shall be submitted to the lodge, in writing, and signed by a member of a lodge within this jurisdiction, and a copy thereof, under seal of the lodge, be served upon him.

"SEC. 4. Such charges shall be referred to a committee of five members, who shall, without unnecessary delay, summon the parties and try the case. They shall keep full minutes of the evidence and of their proceedings, and report the same to the lodge, with their verdict. . . . Upon the report being made, notice thereof shall forthwith be given, by the secretary, to the party against whom the verdict is rendered, and he shall have two weeks in which to file his exceptions. If no exceptions are filed within two weeks the lodge shall proceed to pronounce judgment upon the verdict, and affix the penalty. An appeal from the judgment of the lodge may be taken, at any time within two weeks thereafter, to the grand lodge; and, if no such appeal is taken, the judgment of the lodge shall be final. When a bill of exceptions to the report of the committee is filed, as above provided, the lodge may determine upon its merits, and either sustain the report of the committee, or refer the same back to the same or another committee, or grant a new trial. If the lodge deems the exceptions not well taken, it shall proceed to pronounce its judgment and affix the penalty.

"SEC. 5. If the accused refuse or neglect to stand trial when duly summoned, the committee shall report him guilty of contempt of the lodge, which report shall be conclusive, and the punishment shall be expulsion.

"SEC. 6. If a specific penalty for an offense be provided in the constitution or by-laws, the noble grand shall enforce it. If none be so provided, the lodge shall decide by paper ballot whether the penalty shall be expulsion, suspension, or reprimand and fine. During the ballot the accused brother shall withdraw from the lodge-room. If, upon the first ballot, it shall appear that two-thirds of the ballots are cast for expulsion, such shall be the penalty. If two-thirds of the ballots are not cast for expulsion, then the lodge shall proceed to ballot for suspension; and if two-thirds of the ballots are cast for suspension, suspension shall be the penalty, and the lodge shall proceed to fix the duration of such suspen-

sion, which shall not exceed two years. If neither expulsion nor suspension is determined as the penalty, as above provided, then the penalty shall either be reprimand, fine, or both; if fine is determined upon, then the lodge shall fix the amount, not exceeding ten dollars; if reprimand is decided upon, then the accused shall be reprimanded in open lodge by the acting noble grand. No ballot held under this section shall be reconsidered."

Those portions of the constitution and by-laws hereinabove set out are all fully set out in the pleadings, and none of them is denied by either party. The statement on motion for new trial shows that they were all introduced in evidence without objection. Both parties have properly treated them here as facts of record, without objection on the ground that they are not expressly found as facts by the court; and they are so considered in this opinion.

The only express findings purporting to be findings of fact, requiring any consideration, are the following: "1. That plaintiff did not at any time demand or receive from defendant sick benefits to which he was not entitled. 2. That neither of said charges (which he was summoned to answer before the committee) constitutes any offense against said defendant's constitution or by-laws, nor does either of said charges warrant the expulsion of plaintiff from membership in defendant organization, nor has defendant any power, authority, or jurisdiction to try plaintiff upon said charges, or to expel him from membership therefor; 3. That there is no by-laws, rule, or regulation of defendant making or prescribing said charges a ground of expulsion from membership in said defendant lodge."

The first one of these findings is wholly irrelevant to any material issue of fact in this proceeding, it being responsive only to the charges which the plaintiff was cited to answer before the committee, and which he never denied. Those charges are relevant to this proceeding only for the purpose of determining whether they constitute an infraction of the constitution or by-

laws of the defendant lodge, for which the plaintiff was liable to be tried in the manner proposed and punished *in any way*; and they can be considered on this appeal for no other purpose.

The second and third of these findings are mere conclusions of law, involving only a construction of the constitution and by-laws of the association, or those portions thereof set forth in the record. Indeed, the record presents no question of fact.

That the charges which plaintiff was summoned to answer before the committee constituted a penal offense against the constitution and by-laws of the defendant lodge, which the lodge had jurisdiction to try in the mode proposed, was made sufficiently manifest by the extracts from the constitution and by-laws above set out, to wit: section 2 of article VIII, read in connection with sections 5 and 6 of article IV of the constitution, and section 21 of the by-laws. It was surely a violation of these to demand and receive payments to which they did not entitle him. The abandonment of his proceeding before the lodge to test his alleged right to benefits, and the commencement of the action in the justice's court, was also a plain violation of valid laws of the lodge which deprived him of the right to recover such benefits in any court of the state, though they did not deprive such courts of jurisdiction to hear and dispose of his complaint. Yet the fact that the laws of the lodge provided a remedy for the grievance complained of, which he had not pursued and exhausted, would have been a perfect defense to his action in any state court. (*Robinson v. Irish etc. Soc.*, 67 Cal. 135; *Screwmen's etc. Assn. v. Benson*, 76 Tex. 552; *People v. St. George Soc.*, 28 Mich. 261; *German Reformed Church v. Seibert*, 3 Pa. St. 282; *Olery v. Brown*, 51 How. Pr. 92; *White v. Brownell*, 4 Daly, 329; 4 Abb. Pr., N. S., 162; *Robinson v. Yates City Lodge*, 86 Ill. 598; *Otto v. Journeyman Tailor's etc. Union*, 75 Cal. 308; 7 Am. St. Rep. 156; Bacon on Benefit Societies, 2d ed., sec. 94.)

On the same principle courts of equity decline to in-

terfere with voluntary benevolent associations so long as the means of relief provided by the society itself have not been availed of and exhausted. (*Lafond v. Deems*, 81 N. Y. 507; *Dolan v. Court of Good Samaritan*, 128 Mass. 437; *Chamberlain v. Lincoln*, 129 Mass. 70.)

It is objected to those charges against plaintiff (here for the first time) that they are not sufficiently specific. They are sufficiently specific to apprise the plaintiff "of the nature thereof, and to enable him to prepare for his defense," though the first step in such defense may have been in the nature of a well-grounded special demurrer in a court of law. But they would not be subject to a general demurrer on the ground that they state no offense against the constitution or by-laws of the lodge even in the courts of the state. There was no demurrer, however, nor any motion to have the charges made more specific. The letter of Mr. Collins to the lodge merely denied the power of the lodge to *expel* plaintiff on those charges, and gave notice that any action taken by the lodge in that direction would be a nullity. It contains no complaint that the charges are not sufficiently specific. Besides, plaintiff testified that, on the advice of Mr. Collins, he refused to appear before the committee; therefore his default was intentional and without other excuse than that stated in the letter of his attorneys to the lodge.

In a case very similar to this (*People v. St. George Soc.*, *supra*), in which *mandamus* to reinstate a member was denied, the court said: "As these are proceedings under articles agreed to by all the members, it is necessary to consider them without much regard to technicalities, and to follow substantial justice more than form." In that case the defendant was incorporated.

Whether the penalty of either of those charges might have been expulsion, or only a fine of ten dollars, is immaterial, since plaintiff was not tried nor expelled on either of those charges, but was expelled for contempt of the authority of the lodge in refusing to appear before the committee or to stand trial on those

charges. His expulsion was in strict accordance with section 5 of article VIII of the constitution; and whether that section is valid and binding on the defendant seems to be the only remaining debatable question presented for decision.

The only objections suggested by counsel to section 5, article VIII, are that it makes the report of the committee conclusive, and accords the party reported to be in contempt no opportunity to except to the report of the committee; and that it provides for no appeal from the order of expulsion in that class of cases.

Conceding, without deciding, that both grounds of the objection existed, the question is whether or not the right to except to the report of the committee, or the right to appeal from the order of expulsion, is such that the plaintiff could not have waived it by contract, since there is no question that the plaintiff did all in his power to waive them by signing the constitution and by-laws of the association, which association existed and exercised its functions only by virtue of the contract expressed in its constitution and by-laws signed by all its members.

It is well settled that a person may waive any legal right unless such waiver injuriously affects some other person, or is forbidden by law or opposed to public policy.

A party may, by contract, waive a statutory right (*Bowen v. Aubrey*, 22 Cal. 566), and where, in a criminal case, a verdict has been returned, the defendant may waive the delay of sentence allowed by statute for his benefit, by consenting that judgment on the verdict may be pronounced immediately. (*People v. Robinson*, 46 Cal. 94.) He may also, by contract, waive his constitutional right to notice of and opportunity to defend a civil action against him; for example, a motion for judgment against him on an appeal bond signed by him as surety in accordance with section 942 of the Code of Civil Procedure (*Meredith v. Santa Clara Min. Assn.*, 60 Cal. 617, and cases there cited; *Mowry v. Heney*

86 Cal. 471), on the theory that said section of the code enters into and becomes a part of the bond; whereas, in the case at bar, the plaintiff, without reference to any statute, expressly contracted that the report of the committee in question should be conclusive.

In answer to the suggestion that section 5, article VIII, of the constitution of the defendant is unreasonable and oppressive, and therefore invalid, it is to be observed: 1. That said section is not a by-law in the ordinary sense of the word as applied to corporations, it being a part of the written contract (constitution) by which the unincorporated association (the lodge) was created, and bears the same relation to the association as do charters by the legislature to private corporations (*Hogan v. Pacific Endowment League*, 99 Cal. 248); 2. But even if the defendant lodge had been incorporated, and section 5 of its present constitution had been enacted as a by-law conceded to be unreasonable, and therefore invalid as a by-law, it would nevertheless be valid as a contract if signed or agreed to by all the members of the corporation. "What is bad as a by-law, as against common right, may, however, be good as a contract, since, as a learned writer (Angell and Ames on Corporations) expresses it: "A man may part with a common right voluntarily, of which it would be impolitic and unjust to deprive him by a by-law passed without his assent, or perhaps knowledge, by those who would not consult his individual interests." (Bacon on Benefit Societies, 2d ed., sec. 87, and authorities there cited. See, also, *Slee v. Bloom*, 19 Johns. 456; 10 Am. Dec. 273; *Cooper v. Frederick*, 9 Ala. 738; *Amesbury v. Bowditch etc. Ins. Co.*, 6 Gray, 596; *Davis v. Proprietors etc.*, 8 Met. 821.)

On the facts found and admitted by the pleadings, I think the plaintiff was lawfully expelled from the defendant lodge, and that it was not the duty of the defendant to reinstate him at the time this proceeding was commenced, or at any time since; and, therefore, that the judgment awarding the writ of mandate should be



reversed, and the court below instructed to dismiss the proceedings.

HAYNES, C., and SEARLS, C., concurred.

For the reasons given in the foregoing opinion the judgment awarding the writ of mandate is reversed and the court below instructed to dismiss the proceeding.

McFARLAND, J., TEMPLE, J., HENSHAW, J.

Hearing in bank denied.

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[No. 15839. In Bank.—December 6, 1895.]

**D. E. EASTERBROOK, APPELLANT, v. DAVID FARQUHARSON, RESPONDENT.**

**LANDLORD AND TENANT—LEASE—APPRAISEMENT OF BUILDING—FAILURE OF APPRAISERS TO AGREE—APPLICATION TO COURT—CONTRACT FOR INTEREST.**—Where a lease provided for the erection of a building by the lessee, and for payment by the lessor of two-thirds of the appraised value of the building at the expiration of the term, and that the amount of the appraisal should bear interest at the rate of two per cent per month, compounding monthly until paid, and should be a lien and encumbrance upon the premises, and there was a failure of an appraisal through no fault of the lessor, but by reason of the appraisers failing to agree upon the value or upon a third party to complete the appraisal, and the lessor subsequently applied to the court for an appraisal of the building, after the expiration of the term of lease, the lessor is not chargeable with the conventional rate of interest from the date of the expiration of the term, but is only chargeable with interest from the date of the determination of the suit for appraisal by the court.

**Id.—CONSTRUCTION OF LEASE—LIABILITY OF LESSOR—TENDER.**—The lease in such case should be construed as intended to prevent default on the part of the lessor, and to insure a prompt performance of the conditions of the lease; and where there was no default of the lessor and he was unable to pay any appraised value at the expiration of the lease, or to make any tender thereof, he is not chargeable with the stipulated interest from the expiration of the lease to the entry of judgment in an action to secure a judicial appraisal.

**Id.—INTEREST AS DAMAGES—COMPENSATION FOR WRONG—CERTAINTY—CONSTRUCTION OF CODE.**—Interest cannot be allowed as damages, under the Civil Code, except as compensation for the unlawful act or omission of another, and in cases where the damages are certain or capable of being made certain by calculation, and the right of recovery is vested upon a particular day.

**ID.—SETTLEMENT OF ACCOUNT—ALLOWANCE OF INTEREST.**—Where a plaintiff comes into court seeking a settlement of an account with the defendant, the sum allowed bears interest only from the day of its judicial ascertainment, under section 1917 of the Civil Code.

**ID.—DELAY OF ACTION—FAILURE OF LESSEE.**—Where the lessee failed to avail himself of the right to a speedy determination and payment, by appealing to the court for an appraisement, his failure to do so cannot be urged as a ground for an award of interest in an action which the lessor was finally compelled to bring against him, though such action was not instituted until six months after the expiration of the lease.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. A. A. SANDERSON, Judge.

The facts are stated in the opinion of the court.

*Haven & Haven*, for Appellant.

The lease should be construed according to the intention of the parties. (Civ. Code, secs. 1636, 1638, 1647; *Reedy v. Smith*, 42 Cal. 245; *Walsh v. Hill*, 38 Cal. 487.) Interest can only be allowed as a compensation for the improper detention of money. (Civ. Code, secs. 1915, 1918, 3281; 2 Burrill's Law Dictionary, 91; *Burke v. Caruthers*, 31 Cal. 471.) The intention of the parties was to provide a penalty for default, and the language of the contract must govern, which only makes the amount of the appraisement bear the agreed interest. (Civ. Code, sec. 1638; *Saunders v. Clark*, 29 Cal. 305; *Woodward v. Payne*, 16 Cal. 449.) Interest cannot be allowed upon an unliquidated demand. (Civ. Code, secs. 1919, 3287; *Brady v. Wilcoxson*, 44 Cal. 239; *Cox v. McLaughlin*, 76 Cal. 67-72; 9 Am. St. Rep. 164; *Holliday v. Marshall*, 7 Johns. 211, 213.)

J. F. Cowdery, and Robert Harrison, for Respondent.

The agreement to pay two-thirds of the value at the expiration of the lease cannot be excused by failure of the appraisers to furnish an appraisement. (3 Am. & Eng. Ency. of Law, 900; Broom's Legal Maxims, 241, 242; *Klauber v. San Diego Street Car Co.*, 95 Cal. 353;

*Delaware etc. R. R. Co. v. Burson*, 61 Pa. St. 369-81.) The difficulty of ascertaining the amount of a contract debt does not excuse its nonpayment when due. (*North Hudson Co. R. R. Co. v. Booraem*, 28 N. J. Eq. 450; *Reed v. Hanover etc. R. R. Co.*, 105 Mass. 303-05; *Phillips v. South Park Commrs.*, 119 Ill. 626-45; *Whitman v. Boston etc. R. R. Co.*, 7 Allen, 313-26; *Delaware etc. R. R. Co. v. Burson*, *supra*; *United States v. Engeman*, 46 Fed. Rep. 898.) Interest should have been allowed from the expiration of the term of the lease. (*Van Rensselaer v. Jewett*, 2 N. Y. 135; 51 Am. Dec. 275; *Renwick v. Renwick*, 1 Bradf. 238; *Selden v. James*, 6 Rand. 465, 469-72; *Morris v. Cain*, 39 La. Ann. 712, 736; *Steenrod v. Railroad Co.*, 27 W. Va. 14, 15.)

HENSHAW, J.—Plaintiff, as lessor, and one Apel, as lessee (to whose rights defendant succeeded), entered into a contract of lease which provided for the erection of a building by the lessee upon the demised land, and the payment by him of a stipulated ground rent. It further provided that the lessor, upon the last day of the term, would pay to the lessee two-thirds of the appraised value of the building, which value was to be ascertained and determined as follows:

“Each party shall select a disinterested, practical builder of good repute and standing, residing and doing business in said city and county, and they two shall select a real estate dealer in said city and county; the three to appraise and determine such value. Such selection shall be made ten (10) days before such term expires, and a majority of the three shall determine such value. Each party shall pay one-half ( $\frac{1}{2}$ ) of the charges of said persons so selected. If two-thirds ( $\frac{2}{3}$ ) of the value so determined shall not be paid on said day (provided said building shall then be standing), the amount of such appraisement shall draw and bear interest at the rate of two (2) per cent per month, compounding monthly until paid, and shall be a lien and encumbrance upon said demised premises.”

The building was erected by defendant, and, on the appointed day, each of the parties named an appraiser. These two failed to select the third, and failed to agree upon the value of the building. Time passed. The premises were duly surrendered to plaintiff, but no adjustment was had of the difficulty, though communications looking to this end passed between them. Finally, about six months after the date of the expiration of the lease, plaintiff went into court with a complaint setting up the facts, averring his readiness at all times to pay the defendant two-thirds of the cash value of the building, asserting the impracticability of the scheme of appraisal contemplated in the lease, and asking the court to determine the value of the building at the date of the termination of the lease, and to fix the amount due from him to defendant.

The defendant made answer generally admitting the allegations of the complaint, but denied the impracticability of the method of determining the value set forth in the lease, and averred that the sole impracticability came from the lack of qualifications of the appraiser selected by plaintiff. He claimed the building to be of the value of eighty thousand dollars.

The court in its findings did not fix responsibility for the failure to agree upon either the plaintiff or his appraiser. It determined that the value of the building at the expiration of the lease was forty-eight thousand dollars, two-thirds of which sum was decreed to be due defendant from plaintiff, with interest thereon at the rate of two per cent per month, compounding monthly, from the date of the expiration of the lease to the entry of judgment.

Plaintiff paid the principal amount found due by the judgment, and appeals from that portion charging him with interest.

The questions presented are: 1. Is plaintiff liable for conventional interest under the terms of the contract? 2. Is he liable for interest at the legal rate?

1. Other covenants of the lease provide for interest

at the rate of two per cent per month, compounding monthly, and a consideration of them may aid in the interpretation of the disputed clause. If rent be unpaid when due the amount shall bear interest at the stipulated rate, compounding monthly. If the lessor shall pay insurance premiums the amount so paid shall bear the conventional interest until paid, and a like provision is found as to payment by the lessor of taxes. In each of these cases the interest is a compensation for the detention of money as defined by section 1915 of the Civil Code, and it is something more. The high rate exacted and the monthly compound are designed to prevent default and to insure a prompt performance of conditions, as well as to penalize the delinquent. In each case the lessee can avoid the penalty by paying a known and fixed amount at a known and definite time.

By the covenant in dispute the lessor did not agree to pay to the lessee upon the last day of the term two-thirds of the then value if determined, and, if not determined, then the amount when found due to bear interest at the rate of two per cent a month, compounding monthly until paid, from the last day of the term, which in effect was the interpretation and decree of the court. What he did agree to pay was two-thirds of the value determined in a specific way, and if, upon the last day of the term, he did not pay the sum "*so determined*," as interest and penalty for his default, the amount was to bear the stipulated interest.

Every consideration points to this as the true interpretation of the contract. First, the contract itself declares that it is the amount due under the appraisal which is to bear interest; thus contemplating a breach and default by the lessor before the interest begins to run. Again, it is quite reasonable to suppose that one might be willing to lay himself liable to the penalty of so high a rate of interest if the liability for it arose only by his default. But it is not easy to believe that he would agree to pay it unless the question of his liability could be determined by his own conduct. But

under the construction claimed, without any default on his part, the lessor could neither prevent the interest from beginning to run, nor could he, within any reasonable time, check its accumulation.

Such are the actual circumstances of this case. It appears that the lessor did all that the contract called upon him to do, but the appraisal was not made. The record fixes no responsibility upon him for the failure. He could not pay upon the appraised value. Yet two-thirds of the appraised value was what he was holden for. Here, then, he was stopped by no default of his own. Nor could he make a tender; for unless by inspiration or prevision he offered the exact amount of an undetermined sum, his tender would not avail to stop interest. (*Patterson v. Sharp*, 41 Cal. 133; *Graham v. Linden*, 50 N. Y. 547.)

In short, plaintiff was so situated that he could do nothing other than he did do, which was to ask a court of equity to find and decree the sum. And we think it clear that he was not liable for conventional interest upon that sum.

2. To entitle respondent to interest as damages he must bring himself within the terms of section 3287 of the Civil Code. That section awards interest to every person who is entitled to recover damages, certain, or capable of being made certain, by calculation, where the right of recovery is vested in him upon a particular day. But damages are compensation for the unlawful act or omission of another (Civ. Code, sec. 3281), and, as has been said, appellant had been guilty of no wrong. He went into court asking a settlement of his account with respondent, and under section 1917 of the Civil Code the sum bore interest only from the day of its judicial ascertainment.

When, at the date of the expiration of the lease, the appraisers had failed to determine the value of the building, the scheme of valuation contemplated by the lease had come to an end so far as to entitle the lessee to seek the aid of a court to ascertain the amount due

him by the lessor. In such an action interest would have been allowed only from the date of the judgment. (Civ. Code, sec. 1917.) The lessee failed to avail himself of this right of speedy determination and payment, and his failure cannot be urged as ground for the award of interest in an action which the lessor was finally compelled to bring against him.

No useful purpose can be subserved by a discussion of the authorities upon the question of allowing interest upon unliquidated claims. The task has been performed by this court in the case of *Cox v. McLaughlin*, 76 Cal. 60; 9 Am. St. Rep. 164. The language there employed in summarization is, *mutatis mutandis*, apposite to this case:

"We are not prepared to say, in general terms, that no interest in any case can be recovered in an action upon contract for an unliquidated demand. *Mix v. Miller*, 57 Cal. 356, decided since the adoption of the code, and *McFadden v. Crawford*, 39 Cal. 662, decided previously, attest the doctrine that in this state interest is allowable on such demand under some circumstances.

"These were cases in which the contract had been fully performed by the creditors, the fruits thereof accepted by the debtors, without objection, and they were clearly in default, and in the latter case the only question was as to value.

"But where, as in the case at bar, the amount of these services, their character and value, can only be established by evidence in court, or by an accord between the parties, and are not susceptible of ascertainment, either by computation or by reference to market weights or other known standard, we are of opinion plaintiff is not entitled to interest prior to verdict or judgment."

To the same effect are the cases of *Brady v. Wilcoxson*, 44 Cal. 245, and *Coburn v. Goodall*, 72 Cal. 498; 1 Am. St. Rep. 75.

But here not only is the demand unliquidated, and unascertainable from the face of the contract or from

well-established market values, and not only does it require process of law for its ascertainment, but the party against whom the award is made has never been in default, and finally has been the first to resort to equity to the end that he might ascertain and pay the amount justly due respondent.

For the foregoing reasons the appeal is sustained, and the judgment of the trial court is ordered modified by striking therefrom the portion appealed from which awards interest to respondent to the date of the entry of judgment.

TEMPLE, J., MCFARLAND, J., GAROUTTE, J., VAN FLEET, J., HARRISON, J., and BEATTY, C. J., concurred.

Rehearing denied.

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[L. A. No. 29. Department One.—December 7, 1895.]

JOSEPH MULLER, RESPONDENT, v. ELMER E. ROWELL, APPELLANT.

**FINDINGS—AGREED STATEMENT OF FACTS.**—Where the court, in the decision of a case, adopts the facts stipulated by the parties in an agreed statement, as the facts of the case, and bases its judgment thereon, such agreed statement takes the place and serves all the purposes of a formal finding by the court; and no other or more formal findings are required.

**ID.—AGREED STATEMENT EQUIVALENT TO ADMISSIONS IN PLEADINGS.**—Where the parties stipulate in writing as to what the facts are, and file such stipulation in the action, it is in all substantial respects the equivalent or admitting them in the pleadings; and it is only where the facts are in issue that findings thereon by the court are necessary in any case.

**ID.—FRIVOLOUS APPEAL—DAMAGES.**—Where it is evident that an appeal is frivolous, and taken purely for delay, the appellant will be mulcted in damages.

**APPEAL** from a judgment of the Superior Court of the County of San Bernardino. JOHN CAMPBELL, Judge.

The facts are stated in the opinion of the court.



*Elmer E. Rowell, and A. Brunson, for Appellant.*

Findings of fact are essential to the validity of the judgment. (*Christy v. Spring Valley Water Works*, 84 Cal. 543; *Bennett v. Pardini*, 63 Cal. 154.)

*Paris & Allison, for Respondent.*

Findings of facts were unnecessary, as the case was tried by the court upon an agreed statement of facts as to the evidence of the case. (*Swift v. Muygridge*, 8 Cal. 445.)

VAN FLEET, J.—This is an appeal from the judgment upon the judgment-roll, with a bill of exceptions, and the only point made for a reversal is that the lower court did not file findings, which were not waived.

While the record shows that no formal findings were signed and filed by the judge, it does disclose that the parties presented and filed an agreed statement of facts covering all the issues, and it is recited: "That upon the said statement of facts hereinbefore set forth being filed in the cause, the court ordered judgment in favor of the plaintiff in the said action upon the facts of the case as disclosed by the said statement of facts before referred to and set forth, and that thereupon and on the same day judgment was made and entered in the said action in favor of the plaintiff and against the defendant as prayed for in the complaint."

It thus appears that the court adopted the facts stipulated by the parties as the facts of the case and based its judgment thereon. Under such circumstances, and it appearing that these facts fully support the judgment, no other or more formal findings were required. The statement of facts so agreed to took the place and served all the purposes of a formal finding by the court. (*Brewster v. Hartley*, 37 Cal. 15; 99 Am. Dec. 237.)

It is only where the facts are in issue that findings thereon by the court are necessary in any case; and where the parties stipulate in writing as to what the facts are, and file such stipulation in the action, it is in

all substantial respects the equivalent of admitting them in the pleadings.

It is very apparent, we think, from the record, that this appeal was taken purely for delay, since it presents the merest pretense of merit, without any in fact, and we think it a case where, as respondent suggests, the appellant should be mulcted in damages as for a frivolous appeal.

The judgment is affirmed with fifty dollars damages.

GAROUTTE, J., and HARRISON, J., concurred.

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[No. 16004. Department One.—December 10, 1895.]

**SARAH A. BAILEY, RESPONDENT, v. MARKET STREET CABLE RAILWAY COMPANY, APPELLANT.**

**NEGLIGENCE—INJURY FROM STREET-CAR—CONTRIBUTORY NEGLIGENCE—CARELESS STEPPING UPON TRACK—NONSUIT.**—In an action to recover damages for personal injuries received by plaintiff from collision with a moving cable-car, the act of the plaintiff in stepping backward upon the track in front of the moving car, without noticing an approaching car upon the track some ten feet distant, and in plain view, is contributory negligence, as matter of law, proximately contributing to the injury; and a nonsuit is properly granted upon that ground.

**ID.—DUTY OF ONE WHO CROSSES RAILROAD TRACK—STANDARD OF NEGLIGENCE.**—One who crosses a railroad track is required to be on his guard, and, as the law now stands, the standard is fixed that one must look up and down the track, and anything short of that is negligence.

**ID.—RIGHT OF WAY OF STREET-CAR.**—A street-car has, from necessity, a right of way over that portion of the street upon which alone it can travel, paramount to that of persons and ordinary vehicles, though this superior right is not exclusive, and does not prevent others from driving or passing across or along its tracks at any place or time, when by so doing it will not materially interfere with the progress of the cars.

**ID.—PASSAGE OF CARS—DUTY OF CITIZEN.**—It is the duty of the citizen, whether on foot or in vehicles, to give unobstructed passage to the cars, which cannot turn out or leave the track, and which are operated by companies chartered, presumably, for the convenience of the public.

**APPEAL** from an order of the Superior Court of the City and County of San Francisco granting a new trial.  
**JOHN HUNT, Judge.**

The facts are stated in the opinion.

*Frank Shay, and George W. Baker, for Appellant.*

There was nothing in the situation to indicate to defendant's gripman that plaintiff, being in a safe place between the north and south track, would step backward upon the south track at a moment when the car was perilously close to her, and he had a right to presume that she would remain where she was. (2 Wood's Railway Law, 1264, 1267, et seq.; *Moore v. Philadelphia etc. R. R. Co.*, 108 Pa. St. 349; *Holmes v. Southern Pac. Ry. Co.*, 97 Cal. 161, 168.) It was plaintiff's duty to exercise due care, and the exercise of due care required her to know whether or not defendant's car was approaching the place near which she was standing, and to know whether or not it was safe for her to step upon the south track of defendant's railroad before she made such an attempt. (*Holmes v. Southern Pac. Ry. Co.*, *supra*; *Trouclair v. Pacific Coast S. S. Co.*, 80 Cal. 521; *Baltimore etc. R. R. Co. v. Depew*, 40 Ohio St. 121; *Pittsburgh etc. Ry. Co. v. Collins*, 87 Pa. St. 405; 30 Am. Rep. 371; *Baltimore etc. R. R. Co. v. Whitacre*, 35 Ohio St. 627.) As the facts were undisputed, the question of negligence was one of law for the court, and not one of fact to be determined by the jury. (*Glascock v. Central Pac. R. R. Co.*, 73 Cal. 137; *Trouclair v. Pacific Coast S. S. Co.*, *supra*; *Holmes v. Southern Pac. Ry. Co.*, *supra*; *O'Brien v. McGlinchy*, 68 Me. 552; *Chicago etc. Ry. Co. v. Davis*, 53 Fed. Rep. 61; *Bunt v. Sierra Butte etc. Co.*, 138 U. S. 483; *Railroad Co. v. Jones*, 95 U. S. 443; *Goodlett v. Louisville R. R. Co.*, 122 U. S. 411; *Cunningham v. Chicago etc. R. R. Co.*, 17 Fed. Rep. 882, 886; *Schofield v. Chicago etc. Ry. Co.*, 114 U. S. 616; *Flemming v. Western Pac. R. R. Co.*, 49 Cal. 257; *Pittsburg etc. R. R. Co. v. McClurg*, 56 Pa. St. 294; *Beisiegel v. New York Cent. R. R. Co.*, 40 N. Y. 9; *Fernandes v. Sacramento City R. R. Co.*, 52 Cal. 49.)

*C. M. Jennings, for Respondent.*

A motion for a new trial is addressed to the sound legal discretion of the court (*Breckenridge v. Crocker*, 68

Cal. 403, 404); and an order granting it will not be disturbed unless there is a manifest abuse of that discretion, if it can be justified on any of the grounds on which the motion was made. (*Bennett v. Hobro*, 72 Cal. 179; *Sharp v. Hoffman*, 79 Cal. 407; *Townsend v. Briggs*, 88 Cal. 232; *Bjorman v. Fort Bragg etc. Co.*, 92 Cal. 501; *Blum v. McHugh*, 92 Cal. 497, 498.) Nonsuit should not be granted unless there is no evidence, or a mere scintilla of evidence wholly insufficient for the consideration of the jury. (*Wilson v. Southern Pac. R. R. Co.*, 62 Cal. 172; *Franklin v. Southern Cal. Motor Road Co.*, 85 Cal. 70; *Schierhold v. North Beach etc. R. R. Co.*, 40 Cal. 453; *Gardiner v. Schmaelzle*, 47 Cal. 590; 3 *Lawson on Personal Rights*, 2153; *City Ry. Co. v. Lee*, 50 N. J. L. 435; 7 *Am. St. Rep.* 798; *Railroad Co. v. Stout*, 17 *Wall.* 657.) He who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible. (*Esrey v. Southern Pac. Co.*, 103 Cal. 541, 545.) Persons standing on the track are not trespassers, and their failure to look up and down the track before crossing is not conclusive evidence of contributory negligence, but is only a circumstance for the jury. (*Beach on Contributory Negligence*, 300; *Williams v. Grealy*, 112 *Mass.* 79; *Chicago City Ry. Co. v. Robinson*, 127 *Ill.* 9; 11 *Am. St. Rep.* 87; 1 *Thompson on Negligence*, 399; *Lynam v. Union Ry. Co.*, 114 *Mass.* 83; *Mentz v. Second Avenue R. R. Co.*, 3 *Abb. App. Dec.* 274; *Driscoll v. Market Street Cable Ry. Co.*, 97 Cal. 566; 33 *Am. St. Rep.* 203; *Winters v. Kansas City Ry. Co.*, 99 *Mo.* 509; 17 *Am. St. Rep.* 591.) If there was time to stop, and defendant did not, it is liable. (*Needham v. San Francisco etc. Ry. Co.*, 37 Cal. 422; *Schierhold v. North Beach etc. Ry. Co.*, *supra*; *Shea v. Potrero etc. R. R. Co.*, 44 Cal. 428; *Meeks v. Southern Pac. R. R. Co.*, 56 Cal. 518-21; 38 *Am. Rep.* 67; *Strong v. Sacramento etc. R. R. Co.*, 61 Cal. 329; *Swain v. Fourteenth Street R. R. Co.*, 93 Cal. 184; *Cross v. California Street Ry. Co.*, 102 Cal. 313; *Esrey v. Southern Pac. Co.*, *supra*.)

SEARLS, C.—This is an appeal by the defendant from an order of the court granting a new trial. The action is brought to recover damages for personal injuries received by plaintiff by coming in contact with a moving cable-car, upon the Market street cable road of the defendant. At the trial in the court below, the court granted a nonsuit upon motion of the defendant; and the propriety of this action was the question involved in the motion for a new trial.

The plaintiff, a woman at the age of sixty-six years, in the possession of all her natural faculties, but apparently unfamiliar with cable-cars, being at the Russ House in San Francisco, was invited, on the afternoon of July 19, 1892, by her friend, Dr. George L. Fitch, to take a ride upon the Castro street cars. Pursuant to this invitation the plaintiff, in company with the doctor, proceeded to Market street, up the northerly side of that street to or near a crossing which crosses the street at right angles from the northerly entrance of the Palace Hotel. Plaintiff desired to ride upon the outside. A west-bound Castro street cable-car of defendant was approaching, and, as the seats thereof on the northerly side seemed occupied, while the front seat on the southerly side was vacant, they crossed over the north track upon which their car was approaching, and stood in the space between the two tracks, to do which there was sufficient room. Plaintiff's escort faced the east, and signaled the Castro street car to stop, which it did. Plaintiff, in the mean time, intent upon the approaching west-bound car, failed to see an east-bound car upon the other or southern track, and unconsciously, and without looking, stepped back upon that track, and was struck by an east-bound street cable-car, knocked down, and severely injured.

That plaintiff was guilty of negligence in stepping backward upon the track without noticing an approaching car upon that track some ten feet distant, and in plain view, must, we think, be conceded. Whether it was such contributory negligence as in law will pre-

clude a recovery, and whether it warranted a nonsuit, we will consider later.

The question arises, Was the defendant guilty of such negligence, through the failure of its servants to stop the car which produced the injury, as to render it liable? Or, rather, was the evidence of defendant's negligence such that the question ought to have been submitted to the jury for its determination?

When plaintiff stepped upon the track of the approaching car, and stood with her back to it, as the evidence shows her to have done, and apparently unconscious of danger, and the servants of defendant in charge of such car saw her, and became aware of her danger, as is shown to have been the case by their warning cries to her, it became, and was, their duty to exercise all reasonable care to protect her from injury.

Defendant's cars on the Market street system are provided with two brakes—one, a wooden shoe, which is pressed upon the track by a foot lever, and the other is operated by a hand lever, and acts upon the wheels of the car.

H. Stewart, a witness for plaintiff, was gripman upon the west-bound Castro car upon which plaintiff was about to take passage. His opportunity for observation seems to have been good. He saw plaintiff step upon the south track, and judged the east-bound car was from ten to fifteen feet away, and not running at over half speed; "Not that, I think; about one-quarter, I should think." In answer to a question by the court, he said: "I cannot measure exactly how far the front of the dummy was from plaintiff when she stepped upon the track; I judge about ten feet, maybe; I cannot say exactly." The maximum speed of the Market street cable-cars is eight miles an hour; hence, if the car was moving at half speed, it moved four miles per hour, and if at one-quarter speed, at the rate of two miles per hour.

The grip and brakes of the car doing the injury were managed by a "student," that is, by a man who was, and

for eight days had been, learning the business. Behind him stood his instructor, an experienced gripman, who directed and aided him when deemed necessary. The brakes were applied and the car was stopped just as it struck the plaintiff. "It did not run much over a foot after it struck her."

This witness was of opinion that at that point and at the given rate of speed of the car, fifteen feet was as short a distance as a car could be reasonably stopped. He added: "They did stop this car at the speed at which it was going within one or two feet after it struck plaintiff; I don't know whether they could have stopped it within that space just before it struck her or not; if they had time, and knew that she would step backward on the track, I suppose they could."

Another witness for plaintiff, Thomas Moran, a gripman of nine years' experience, seven years of which was spent on the Market street system, thought that a car going east at full speed, in front of the Palace Hotel, under favorable circumstances could be stopped in four or five feet, and when at half speed in about three feet.

Still another witness, a gripman formerly employed on Market street, testified that on a dry track and car in perfect order he had stopped a car going east in front of the Palace Hotel in six feet—at other times it takes ten to fifteen feet, depending upon the track. This was when running at full speed. At half speed could stop in six feet. He thought it would take a second or more to let the grip off and put on the brake.

The foregoing is believed to contain a fair statement of the substance of the evidence upon the points of negligence. The experts speak either from memory or from their judgment, and do not profess to be mathematically correct. That they are not precisely correct is apparent when we realize that a car, in running eight miles to the hour, covers eleven and eleven twenty-fifths feet per second, and if it takes one second to throw off the grip and apply the brakes, that distance must be traversed before they act in checking the momentum of the car.

The fact probably is that a prudent gripman, upon seeing, say a vehicle upon his track, while he expects it to leave his course, yet handles his brakes as a matter of precaution, and almost imperceptibly loosens his grip and slows down; if the obstruction does not vacate the track, forewarned and forearmed he stops in a brief space, while if the same obstacle had unexpectedly dropped upon the track a car's length away, a collision would have been probable. The record shows that in granting a nonsuit the court gave the following reasons for its actions: "Conceding that the gripman might have stopped the car in six feet, that the plaintiff was standing only ten or fifteen feet away, and that he was only going two miles an hour, assuming all that, still the plaintiff did not exercise ordinary care to prevent it; therefore the motion for nonsuit is granted."

The solution of two questions is essential to a decision of the case: 1. Was the plaintiff guilty of such contributory negligence as in law will defeat her recovery? 2. If the first question be answered in the affirmative, then was the defendant guilty of such willful and wanton negligence as entitled her to recover, notwithstanding her own contributory negligence?

Market street is an open public street of the city and county of San Francisco, over which vehicles of great variety and pedestrians are accustomed to pass and re-pass in great numbers and at all times, and the vicinity of the Palace Hotel is one of its most frequented portions.

In the earlier cases touching the relative rights of street-cars, private vehicles, and foot passengers upon the public streets, a great diversity of opinion was expressed. Sometimes it was held that upon that portion of the streets covered by the tracks their rights were equal, and that drivers of ordinary vehicles might, with impunity and from mere convenience, drive across and along the track at any rate of speed they chose, while in other cases it was held that the right of way of the street-car was practically exclusive, and that any use of the



tracks not actually necessary or for the purpose of a crossing was a trespass, and in case of a collision was such negligence on the part of a private driver as would absolve the street-car company from liability for the consequences of a resulting accident, unless it was attributable to malice or sheer recklessness.

Out of this medley of decisions the courts, profiting by time and experience, and in some instances aided by legislation, have gradually evolved the theory: 1. That the street-car has, and from the necessities of the case must have, a right of way upon that portion of the street upon which alone it can travel, and which it cannot leave, paramount to that of persons and ordinary vehicles; 2. That this superior right is not exclusive, and does not prevent others from driving or passing across or along its tracks at any place or time, when by so doing it will not materially interfere with the progress of its cars. In other words, the better right is not an exclusive right, and can only be enforced against those who needlessly impose obstacles to its force and unrestricted exercise. (*Shea v. Potrero etc. R. R. Co.*, 44 Cal. 414; *Chicago etc. Ry. Co. v. Ingraham*, 131 Ill. 659; *Rend v. Chicago etc. Ry. Co.*, 8 Ill. App. 517; Booth on Street Railway Law, sec. 303, and cases there cited.)

In the case of ordinary steam railroads the companies are usually the exclusive owners of their rights of way, and have, except at crossings, the exclusive right to the use of their tracks at all times and places. He who without permission, express or implied, intrudes thereon is a trespasser, to whom they owe no duty beyond refraining from doing him a willful injury. Not so with the citizen who enters upon the track of a street railway. These last are used in common by their cars and the traveling public.

The mere fact that an individual is upon a street-car track in the heart of a city where men are wont to come and go, in itself and divested of all other circumstances, raises no presumption of law, and is not even evidence of negligence. It is the time, place, and surrounding

circumstances which afford the evidence of negligence in the case of footmen upon the track.

The common use is necessary in cities. True, the railway companies have certain superior rights. Their cars have the right of way, and it is the duty of the citizen, whether on foot or in vehicles, to give unobstructed passage to the cars. This results from two reasons: 1. That the car cannot turn out or leave the track, while the vehicle or passenger can; 2. These companies are chartered, nominally at least, for the convenience of the public.

Their duties to that public require them to move with regularity and with all reasonable celerity. Manifestly, this cannot be accomplished if they must pause or give way to every foot passenger or vehicle whose convenience or pleasure may prompt an obstruction of the way. The latter can cross and pass elsewhere; the former cannot. The duties of the car companies and of the public are each enhanced by the peculiar conditions. The former must see to it that their servants are on the alert, not only at street crossings, but everywhere upon the tracks, to see that citizens are not run down and injured.

The citizen, if upon the track, must leave it when the car approaches; if about to cross it he must use his senses of sight and hearing before stepping on the track, to ascertain whether a car is approaching, and, in the absence of some well-known custom or regulation at crossings which renders such a precaution on his part unnecessary, he is guilty of negligence if he fails to look before he passes upon the track, and if all the facts plainly and inevitably point to such negligence, leaving no room for argument or doubt, it is negligence in law.

The plaintiff was standing between the tracks, with ample space to insure her safety. With an approaching car upon the other track in plain view, but ten to fifteen feet away, and without, so far as appears, any circumstances of excitement to render her unjudging, and with-

out looking, as it was her duty to do, she stepped in front of the approaching car and was injured.

This was contributory negligence. If it was not negligence in law, we can conceive no case that is, short of a willful performance of the same or a similar act. (*Davenport v. Brooklyn City R. R. Co.*, 100 N. Y. 632; *Kelly v. Hendrie*, 26 Mich. 255; *Scott v. Third Avenue R. R. Co.*, 59 Hun, 456; *Harnett v. Bleecker Street etc. R. R. Co.*, 49 N. Y. Super. Ct. 185; *Fenton v. Second Avenue R. R. Co.*, 126 N. Y. 625; *Buzby v. Philadelphia Traction Co.*, 126 Pa. St. 559; 12 Am. St. Rep. 919.)

Booth on Street Railway Law, after discussing the doctrine and the cases touching the duty of persons to look before passing upon or over the tracks of street railways, at section 315, uses the following language: "Although the law on this point awaits further elucidation and development by the courts, the decisions thus far rendered, both in the United States and Canada, tend to establish the rule, at least with reference to electric and cable railways, that the failure to look or listen before attempting to cross, where such precautions would prevent collision, is in law such negligence as will defeat a recovery in an action for damages by the person so injured." That the negligence of plaintiff directly contributed to and was the proximate cause of her injury is too plain to call for discussion.

Upon the proposition as to the defendant having been guilty of willful negligence it is only necessary to say that the evidence shows that the servants of defendant tried in good faith to stop the car, and did stop it within one foot of the point of collision with plaintiff. We are of opinion the motion for a nonsuit was properly granted, and as the question presented was one of law, and not one in which the court below was clothed with a discretion which we are called upon to treat with latitude, we think the order granting a new trial was erroneous. It is said that the motion for a new trial was granted upon the authority of *Esrey v. Southern Pac. Co.*, 103 Cal. 541, and *Cross v. California Street etc. Ry. Co.*, 102

Cal. 313, cases which were reported subsequently to the nonsuit herein. We fail to recognize in those cases any conflict with the theory upon which the nonsuit was granted.

In *Esrey v. Southern Pac. Co.*, *supra*, the plaintiff was clearly guilty of contributory negligence in placing herself in a dangerous position between the track of defendant and a platform five feet high. With full knowledge of her perilous situation defendant's train was backed down in part past her, an additional and wider car attached and the train signaled to go forward, which it did, crushing her against the platform, and when thus crushed she had fallen to the ground, the servant of defendant again signaled the train to go ahead. All the circumstances showed such wanton recklessness on the part of defendant's servants, such an utter disregard of the safety and life of the plaintiff, as to constitute willful and wanton injury, which entitled a party injured to recover notwithstanding her own previous contributory negligence.

*Cross v. California Street etc. Ry. Co.*, *supra*, was an action to recover damages against a street railway company. It appeared that plaintiff, a teamster, was engaged in hauling a heavy load of lumber down a steep grade on California street, and had secured his wheel with a lock chain, which broke, and, without fixing it, plaintiff drove on zigzagging down the hill, walking beside the wagon, when defendant's car came down the hill, struck the hind wheel of plaintiff's wagon, swung it around and squeezed plaintiff between his wagon and the dummy, to his injury.

It was insisted by appellant that plaintiff was guilty of contributory negligence, and that a nonsuit should have been granted in the court below: 1. In continuing down the steep grade with a heavy load after his lock chain broke; and 2. That plaintiff had placed himself upon defendant's car track without first looking if a car was coming upon him.

This court held that the nonsuit was properly denied,

and, among other things, said: "It cannot be said it was negligence in law to attempt to descend the hill without a lock-chain."

The propriety of this conclusion becomes apparent when we reflect that it depended upon the strength of the team, the weight of the load, and the angle of the grade, factors upon which no court could base a conclusion of law, but which presented a compound question of law and fact to be presented to the jury under proper instructions.

This again was supplemented with evidence that the team could and did safely convey the load down the hill after the collision, without a lock chain. It further appeared that plaintiff could see the track of defendant for one hundred feet, and it was unobstructed, etc.

The case is not analogous to the one at bar. See *Beach on Contributory Negligence*, section 452, where, after discussing the rule requiring one who crosses a railroad track to be on his guard, etc., it is said: "But as the law now stands the standard is fixed. One must look up and down the track. Anything short of that is negligence." (*Hager v. Southern Pac. Co.*, 98 Cal. 310.)

We recommend that the order granting a new trial be reversed, and that the court below be directed to enter judgment in favor of defendant upon the order granting a nonsuit.

HAYNES, C., and BRITT, C., concurred.

For the reasons given in the foregoing opinion the order granting a new trial is reversed and the court below directed to enter judgment in favor of defendant upon the order granting a nonsuit.

HARRISON, J., GAROUTTE, J., VAN FLEET, J.

Hearing in Bank denied.

[No. 16003. Department One.—December 10, 1895.]

I. G. WICKERSHAM, APPELLANT, v. JAMES L. CRITTENDEN, RESPONDENT.

**CORPORATIONS—SALARY OF PRESIDENT—RATIFICATION OF ILLEGAL RESOLUTION.**—Where a resolution adopted by the board of directors of a corporation, and spread upon its records, on its face purports to be an authentic and efficient act of the corporation fixing the salary of the president at a specified sum, but is rendered illegal by the fact that though the president was one of the board of directors, and his vote was essential to its adoption, he was personally disqualified from voting thereon, such resolution may be ratified, confirmed, and adopted by a subsequently elected board of directors, of which the president is not a member; and such ratification has the effect to validate the original resolution; and for the purpose of justifying the president in taking the salary is to be construed with the same effect as if the original resolution had been properly adopted.

**ID.—ACTION BY STOCKHOLDER—DEFENSE—ESTOPPEL OF CORPORATION.**—An action brought by a stockholder to recover money paid to the president of the corporation on account of salary is brought for the account of the corporation, and not for the individual benefit of the stockholder; and whatever would have estopped the corporation from recovering a judgment against its president is equally a defense against the action by the stockholder.

**APPEAL** from a judgment of the Superior Court of Alameda County and from an order denying a new trial. W. E. GREENE, Judge.

The facts are stated in the opinion of the court.

*Lippitt & Lippitt*, for Appellant.

The fixing of the salary at four hundred dollars on the 20th of January, 1891, was void, for the reason that only two of the directors were present, one of whom was Crittenden, who was interested. (*Wickersham v. Crittenden*, 93 Cal. 17.) A ratification of a specific act must be direct, explicit, and refer to the act intended to be ratified, in order to be complete in itself. (*Farmers' etc. Co. v. San Diego etc. Co.*, 45 Fed. Rep. 518.)

*Crittenden, Foote & Van Wyck*, for Respondent.

The acts of less than a quorum of a board are valid and binding upon the corporation if subsequently rati-

fied by a quorum. (*Smith v. Los Angeles etc. Assn.*, 78 Cal. 292; 12 Am. St. Rep. 53; *Austin's case*, 24 L. T. Rep., N. S. 932; *Oregon Ry. Co. v. Oregon Nav. Co.*, 28 Fed. Rep. 505; Civ. Code, sec. 308; *Eureka Co. v. Bailey Co.*, 11 Wall. 491; 2 Morawetz on Private Corporations, sec. 626; *People v. Swift*, 31 Cal. 28; *Zottman v. San Francisco*, 20 Cal. 102; 81 Am. Dec. 96; Mechem on Agency, sec. 167; Story on Agency, sec. 244; *Fleckner v. United States Bank*, 8 Wheat. 362; *Marsh v. Fulton County*, 10 Wall. 684; *Cook v. Tullis*, 18 Wall. 338; *Norton v. Shelby County*, 118 U. S. 451; *United States Express Co. v. Rawson*, 106 Ind. 217; *Davis v. School Dist. etc.*, 44 N. H. 407.)

HARRISON, J.—The plaintiff, as a stockholder in the Bank of San Luis Obispo, brings this action on behalf of himself and other stockholders, for the benefit of the corporation, to compel the defendant to account for and pay over to the corporation certain moneys received by him ostensibly for his salary as president, but which the plaintiff alleges were received without right. The facts out of which the cause of action is claimed to arise are stated in the opinion given in *Wickersham v. Crittenden*, 93 Cal. 17, and in an action similar to the present which was brought May 16, 1892, with reference to the salary received by the defendant prior to that date, and which is reported in 106 Cal. 327. The present action was brought May 24, 1893, and it is alleged in the complaint that the defendant had received of the moneys of the corporation the sum of four hundred dollars per month, from May 16, 1892, until November 1, 1892, and that the only salary that he was authorized to receive was fixed by the directors at two hundred dollars per month, in October, 1890. The court found that the defendant had received the salary of four hundred dollars a month from May 16, 1892, up to and including the thirtieth day of June, 1892, but not subsequently, and that his taking of this salary was authorized by the corporation, and gave judgment for the defendant.

In the case reported in 93 Cal. 17, it was held that the original resolution adopted at the meeting of the directors December 12, 1890, fixing the salary at four hundred dollars, was illegal. The resolution was, however, adopted by the board of directors of the corporation, and was spread upon its records, and on its face purported to be an authentic and efficient act of the corporation. Its invalidity arose from the fact that Crittenden, whose vote was essential to its adoption, was personally interested in the subject matter of the resolution, and, therefore, disqualified from voting thereon. The resolution was, however, within the power of the corporation to adopt, and, though invalid at the time it was adopted, could be subsequently ratified by a competent board of directors, or could be adopted anew, either by reference to it as it was spread upon the records, or by its introduction as an original resolution.

It is not necessary to consider the attempted ratification by the board of directors, which in the former case (*Wickersham v. Crittenden*, 93 Cal. 17), was held to have been illegally constituted, and as the purported ratification at the annual meeting of the stockholders in October, 1891, was adopted only by counting the vote of Crittenden therefor, that also may be laid out of consideration. At this annual meeting another board of directors was chosen, which, at a meeting held June 17, 1892, passed a resolution by which they "ratified, approved, confirmed, and adopted" the resolution which had been adopted by the board of directors December 12, 1890, and, at the same time, fixed the salary of the president at two hundred and fifty dollars per month from and after the first day of July, 1892. This resolution had the effect to validate the original resolution, and, for the purpose of justifying the action of the defendant in taking the salary, is to be construed with the same effect as if the original resolution had been properly adopted. The present action by the plaintiff is brought for the account of the corporation, and not for his individual benefit, and whatever would estop the



corporation from recovering a judgment against the defendant is equally a defense against the present action of the plaintiff.

The judgment and order are affirmed.

GAROUTTE, J., and VAN FLEET, J., concurred.

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[L. A. No. 80. Department One.—December 10, 1895.]

GEORGE W. RYAN, RESPONDENT, *v.* CLARA HOLLIDAY ET AL., DEFENDANTS. HEBER INGLE, ADMINISTRATOR, ETC., APPELLANT.

**FORECLOSURE OF MORTGAGE—PLEADING—AVERMENT OF NONPAYMENT ESSENTIAL—APPEAL FROM DEFAULT JUDGMENT.**—In an action to foreclose a mortgage securing a note, the breach of the contract to pay the note is of the essence of the cause of action, and must be alleged; and a failure to aver nonpayment of the note is fatal to the complaint upon appeal, although no demurrer was interposed, and the judgment went by default.

**ID.—AVERMENT OF AMOUNT DUE—CONCLUSION OF LAW.**—An averment that "there is now due and owing to the plaintiff" a specified sum is but the averment of a conclusion of law, and not of a fact, and is not the equivalent of an averment of nonpayment.

**ID.—ESTATES OF DECEASED PERSONS—PURCHASE OF MORTGAGED LAND BY DECEDENT—PLEADING—PRESENTATION OF CLAIM—WAIVER.**—A complaint in an action to foreclose a mortgage which was not executed by the deceased person, in which the administrator of the deceased person is made a party defendant solely by reason of the fact that subsequently to the making of the mortgage the mortgaged land was purchased by the decedent in his lifetime, and the title thereto vested in his estate at his death, subject to the mortgage lien, need not aver either a presentation of a claim against the estate of the decedent, or an express waiver of any recourse against his general estate.

**ID.—CLAIMS AGAINST ESTATE—CONSTRUCTION OF CODE.**—Section 1500 of the Code of Civil Procedure only applies to cases where the note and mortgage constitute a claim against the estate of a deceased person, and has no application to a case where he purchased the land subject to a mortgage, in which case there is no claim to be presented against his estate.

**ID.—SUFFICIENCY OF SUMMONS—REPRESENTATIVE CAPACITY OF ADMINISTRATOR—REFERENCE TO COMPLAINT.**—In an action to foreclose a mortgage, in which one of the defendants is described by name in the summons with the appended words "administrator with the will annexed," etc., of a deceased person named, and the summons refers to the complaint for further particulars, in which it is alleged that such defendant, "as administrator, etc., has or claims

to have an interest in the mortgaged premises, subject and subsequent to the lien of the mortgage,' the summons is not defective upon the ground that it does not show that such administrator was sued in his representative capacity.

APPEAL from a judgment of the Superior Court of Riverside County. J. S. NOYES, Judge.

The facts are stated in the opinion of the court, with the exception of the alleged defect in the summons, in respect of which the facts appear in the last syllabus.

*L. Gill, and Trippet & Neale, for Appellant.*

The summons is defective in that it does not show that Ingle is sued in a representative capacity, as administrator, the words following his name being merely *descriptio personae*. (1 Am. & Eng. Ency. of Law, 388; 17 Am. & Eng. Ency. of Law, 495, and cases cited; *Stockton etc. Assn. v. Chalmers*, 75 Cal. 332; Am. St. Rep. 173; *Burling v. Thompkins*, 77 Cal. 257.) The complaint is fatally defective, as it does allege that the debt has not been paid. (*Ward v. Clay*, 82 Cal. 502, 511; *Davanay v. Eggenhoff*, 43 Cal. 395; *Scroufe v. Clay*, 71 Cal. 123; *Barney v. Vigoreaux*, 92 Cal. 631; *Roberts v. Treadwell*, 50 Cal. 520; *Frisch v. Caler*, 21 Cal. 71.) It should have alleged, also, either a presentation of a claim against the estate of appellant's intestate or an express waiver of any recourse against it. (Code Civ. Proc., sec. 1500; *Ellis v. Polhemus*, 27 Cal. 350; *Verdier v. Roach*, 96 Cal. 467.)

*Purington & Adair, for Respondent.*

The summons is sufficient as it referred to the complaint which showed in what capacity Ingle was sued. (Code Civ. Proc., sec. 1963, subd. 25; *Bewick v. Muir*, 83 Cal. 370; *Finch v. Riverside etc. Ry. Co.*, 87 Cal. 602; *Burling v. Thompkins*, 77 Cal. 257; *King v. Blood*, 41 Cal. 314; *Calderwood v. Brooks*, 28 Cal. 151; *Herman v. Santee*, 103 Cal. 519; 42 Am. St. Rep. 145.) It was not necessary that all claims against the estate be waived, as Ingle, as administrator of the estate, was made a party

only because he as such administrator claims some interest in the mortgaged premises. (*Sichler v. Look*, 93 Cal. 608; *Thomson v. Bettens*, 94 Cal. 84; *Wenzel v. Schultz*, 100 Cal. 250.) The allegation, "that there is now due and owing from defendant to plaintiff on the promissory note sued on a balance of seven hundred and ninety dollars and seventy-five cents," is equivalent to an allegation of nonpayment. (*Pechaud v. Rinquet*, 21 Cal. 76; *Notman v. Green*, 90 Cal. 173, 174; *Bank of Sonoma County v. Charles*, 86 Cal. 322.)

VAN FLEET, J.—The judgment in this case must be reversed for want of any averment that the note secured by the mortgage sought to be foreclosed has not been paid. The only allegation in this regard is:

"That the interest on said note and mortgage has been paid in full up to the eleventh day of September, 1894, and there is now due and owing to the plaintiff the sum of twelve hundred dollars (\$1,200), with interest thereon at the rate of twelve per cent per annum from the eleventh day of September, 1894."

This is not the equivalent of an averment of nonpayment. The language, "There is now due," etc., is but a conclusion of law and not the averment of a fact. The breach of the contract to pay is of the essence of the cause of action and must be alleged. (*Frisch v. Caler*, 21 Cal. 71; *Scroufe v. Clay*, 71 Cal. 123; *Roberts v. Treadwell*, 50 Cal. 521; *Barney v. Vigoreaux*, 92 Cal. 631.) The fact that no demurrer was interposed and that judgment went by default makes no essential difference, since the defect goes to the statement of a cause of action (*Barney v. Vigoreaux*, *supra*); and that defect is not waived by a failure to demur. (Code Civ. Proc., sec. 434.)

While we are reluctant, as suggested in *Notman v. Green*, 90 Cal. 173, to reverse a judgment upon such a technicality, and especially in favor of a defendant who has apparently stood by and permitted the court below to overlook an error, susceptible of easy correction,

and then takes advantage of such error on appeal; and while we would avoid the necessity, if possible, on the other hand, that consideration is largely neutralized by the further one, that a party guilty of such an inexcusable breach of good pleading as is here exhibited is not entitled to have it lightly condoned, but should suffer the consequences.

The objection that the complaint should have averred either a presentation of a claim against the estate of appellant's intestate, or an express waiver of any recourse against the general estate, is not well taken. Section 1500 of the Code of Civil Procedure has no application to the facts of this case. The note and mortgage sued on were not in any sense a claim against the estate of said intestate. The latter was not the maker of the note or mortgage, nor did a demand of any character exist thereunder against the estate. The representative was made a party defendant solely by reason of the fact that subsequently to the making of the mortgage in suit the mortgaged land was purchased by said intestate in his lifetime, and the title thereto rested in his estate at his death, subject to the mortgage lien. It was necessary to make his representative a party only for the purpose of foreclosing the rights of the estate in the land and for that purpose alone. The estate of said intestate was in no way holden for any deficiency that might arise out of a sale of the property, nor was any such relief asked or taken. There was, therefore, no claim to be presented against said estate. The section referred to applies only to instances where the note and mortgage constitute a claim against the estate of the deceased.

There is nothing in the alleged defect in the summons. (*Bewick v. Muir*, 83 Cal. 370.)

The judgment is reversed and the cause remanded with directions to the court below to permit plaintiff to amend his complaint.

HARRISON, J., and GAROUTTE, J., concurred.

[No. 15905. Department One.—December 10, 1895.]

VINCENT P. BUCKLEY, APPELLANT, v. GILES H. GRAY, RESPONDENT.

**NEGLIGENCE—ATTORNEY AND CLIENT—DRAWING OF WILL—IMPROPER ACTION BY LEGATEE.**—A legatee named in a will cannot maintain an action to recover for alleged negligence of an attorney employed by the testator to draw the will, in so drawing it as not to express legally the desires or direction of the testator as to the exclusion of grandchildren, by which exclusion the legatee would have been benefited, and in further causing the legatee to become one of the subscribing witnesses, thus rendering the will void as to him; and a complaint of such legatee seeking to recover damages from the attorney for such alleged negligence does not state a cause of action.

**ID.—LIABILITY OF ATTORNEY FOR NEGLIGENCE LIMITED TO CLIENT—PRIORITY OF CONTRACT.**—Where an attorney has been guilty of no fraud or collusion, nor of any malicious or tortious act, he is liable only to the client employing him for any injury arising from mere negligence, however gross, and cannot be held liable to a third party with whom he had no privity of contract.

**ID.—BREACH OF CONTRACT—RIGHT OF THIRD PARTY.**—A third party has no right to maintain an action for injuries resulting from a breach of contract between two contracting parties.

**ID.—LIMIT OF ACTIONABLE NEGLIGENCE—DUTY.**—The limit of the doctrine relating to actionable negligence, in the absence of fraud and collusion, is that the person causing the loss must owe a duty, arising from contract or otherwise, to the person sustaining such loss; and if there is no such duty no action can be maintained, no matter how great the loss of the plaintiff may be.

**ID.—CONTRACT FOR BENEFIT OF THIRD PERSON—CONSTRUCTION OF CODE.** Section 1559 of the Civil Code, which authorizes a third person to enforce a contract made by one person with another for his benefit, applies only to cases where the contract is made expressly for the benefit of the third person, and not where the third person is or may be incidentally or remotely benefited as a result of the contract.

**ID.—DISTINCTION BETWEEN WILL AND CONTRACT.**—The terms of the contract of employment of an attorney to draft a will are distinct from the terms of the will; and the fact that the will may be intended for the benefit of a third person does not make the contract of employment of the attorney a contract made expressly for his benefit.

**ID.—INTENTION OF TESTATOR—EFFECT OF WILL—RIGHT OF LEGATEE NOT VESTED—ULTIMATE INJURY—DAMNUM ABSQUE INJURIA.**—The intention of a testator that the legatee should be benefited by being provided for in his will in a particular way, if carried out, could not create a vested right until the death of the testator, and until that event the will would remain ambulatory, and the provision for the legatee could be at any time changed or withdrawn; and any ultimate consequential injury to the legatee by the negligence of the attorney in not drafting the will according to the testator's intention, however great it may be, is *damnum absque injuria*, against which the courts cannot relieve.

APPEAL from a judgment of the Superior Court of Alameda County. FRANK B. OGDEN, Judge.

The facts are stated in the opinion of the court.

*Blake, Williams & Harrison, for Appellant.*

An attorney is liable to his client for negligence in the discharge of his duties, and he is also liable to third parties suffering damage from his negligence. (*Wood v. Weir*, 5 B. Mon. 544; 16 Am. & Eng. Ency. of Law, 419, 420; *People v. Bradt*, 6 Johns. 318; *Newberry v. Lee*, 3 Hill, 523; *Kane v. Van Vranken*, 5 Paige, 62; *McVey v. Cantrell*, 8 Hun, 522; *Weeks on Attorneys*, 2d ed., 584-89; 1 Am. & Eng. Ency. of Law, 561; *Gambert v. Hart*, 44 Cal. 542; *Galveston City R. R. Co. v. Hewitt*, 67 Tex. 473; 60 Am. Rep. 32; *Gynn v. Kelly*, 1 Strob. 402; *Cushman v. Brown*, 6 Paige, 539; *White v. Washington*, 1 Barnes' Notes, 411; *Robson v. Eaton*, 1 Term Rep. 62; *Goodwin v. Gibbons*, 4 Burr. 2108; *Barker v. Braham*, 3 Wils. 368, 377; *Vincent v. Groome*, 1 Chit. 182; *Bates v. Pilling*, 6 Barn. & C. 38.) As Mrs. Buckley's employment of defendant was for the benefit of plaintiff, he owed a contractual duty to plaintiff to exercise ordinary care. (*Rodenbarger v. Bramblett*, 78 Ind. 213; *Henderson v. McDonald*, 84 Ind. 149; *Carnahan v. Tousey*, 93 Ind. 561; Civ. Code, sec. 1559; *Dutton v. Pool*, 1 Vent. 318; *Felton v. Dickinson*, 10 Mass. 287; *Mellen v. Whipple*, 1 Gray, 317; *Jefferson v. Asch*, 53 Minn. 446; 39 Am. St. Rep. 618.)

*Haven & Haven, for Respondent.*

An attorney is not liable for negligence to one between whom and himself the relation of attorney and client does not exist. (*Weeks on Attorneys*, 2d ed., sec. 293; *Fish v. Kelly*, 17 Com. B., N. S., 194; *Brown v. Mallett*, 5 Com. B. 599; *Seymour v. Maddox*, 16 Q. B. 326; *Buffalo v. Holloway*, 7 N. Y. 493; 57 Am. Dec. 550; 16 Am. & Eng. Ency. of Law, 411; *Cooley on Torts*, c. 21; *Wharton on Negligence*, sec. 3; *Kahl v. Love*, 37 N. J. L. 5; *Warner v. Railroad Co.*, 6 Phila. 537; *Deering on Negli-*

gence, sec. 3; *Savings Bank v. Ward*, 100 U. S. 195; *Harshman v. Winterbottom*, 123 U. S. 222; *Roddy v. Missouri Pac. Ry. Co.*, 104 Mo. 234; 24 Am. St. Rep. 333; *Winterbottom v. Wright*, 10 Mees. & W. 109; *Burdick v. Cheadle*, 26 Ohio St. 393; 20 Am. Rep. 767; *Maguire v. Magee* (Pa., April 23, 1888), 13 Atl. Rep. 551; *Necker v. Harvey*, 49 Mich. 518; *Deford v. State*, 30 Md. 195; *Marvin Safe Co. v. Ward*, 46 N. J. L. 19; *Sproul v. Hemmingway*, 14 Pick. 1; 25 Am. Dec. 350; *Mann v. Chicago etc. Ry. Co.*, 86 Mo. 347; *Lampert v. Laclede Gaslight Co.*, 14 Mo. App. 376; *Gordon v. Livingston*, 12 Mo. App. 267; *Loop v. Litchfield*, 42 N. Y. 357; 1 Am. Rep. 543.) A third party can sue only for breach of contract expressly made for his benefit; the fact that a benefit would inure to him from the performance of the contract is not sufficient. (*Simson v. Brown*, 68 N. Y. 355; *Lake Ontario R. R. Co. v. Curtiss*, 80 N. Y. 222; *Vrooman v. Turner*, 69 N. Y. 280; 25 Am. Rep. 195.)

VAN FLEET, J.—Action to recover for negligence of attorney in drafting and executing a will.

The court below sustained a demurrer to the complaint, and plaintiff failing to amend, judgment was entered against him, from which he appeals.

The complaint alleges, in substance, that on October 5, 1883, defendant, an attorney at law, was employed by Mrs. C. M. A. Buckley, the mother of plaintiff, to draw her will, which she desired and directed to be so drawn as to leave all the residue of her estate (after certain specific legacies), to her two sons, then living, the plaintiff and one John P. Buckley, to the exclusion of the children of a deceased son of the testatrix; that in pursuance of such employment defendant on said day drew a will for said testatrix, and superintended and directed the execution thereof; that in the preparation of said will, and in directing the execution thereof, the defendant was guilty of gross carelessness and negligence in the performance of his professional duties, in this, that said will was so drawn as not to legally express the de-

sires or direction of the testatrix as to the exclusion of said grandchildren, but in such manner that the latter were permitted under the will to take of her estate; and that in directing the execution of said will this plaintiff, although named in said will as one of the devisees thereunder, was caused by the defendant to become one of the subscribing witnesses thereto, thereby rendering the provisions of said will as to the plaintiff void.

It is further alleged that said John P. Buckley died before the testatrix; that thereafter, in May, 1891, said testatrix died without having revoked or altered said will; that the will was admitted to probate, and the estate of said testatrix duly administered, and that under the decree of distribution said grandchildren received one-half of said estate, amounting to eighty-five thousand dollars, in which amount plaintiff alleges himself damaged, and for which he asks judgment against defendant.

We think the demurrer was properly sustained. In our judgment the complaint clearly fails to state a cause of action against defendant in favor of the plaintiff. It is to be observed that the action is not by the client, but by a third party, her son. It is a general doctrine, sustained by an overwhelming weight of authority, that an attorney is liable for negligence in the conduct of his professional duties, arising only from ignorance or want of care, to his client alone—that is, to the one between whom and the attorney the contract of employment and service existed, and not to third parties. The exceptions to this general rule, if they may be in strictness deemed such, are where the attorney has been guilty of fraud or collusion, or of a malicious or tortious act. Responsibility for a fraudulent act is independent of any contractual relation between the guilty party and the one injured; and one committing a malicious or tortious act to the injury of another is liable therefor, without reference to any question of privity between himself and the wronged one. Where, however, neither of these elements enter into the transaction, the rule is



universal that for an injury arising from mere negligence, however gross, there must exist between the party inflicting the injury and the one injured some privity by contract or otherwise, by reason of which the former owes some legal duty to the latter. (2 Shearman and Redfield on Negligence, secs. 562, 574; *Savings Bank v. Ward*, 100 U. S. 195, and cases therein cited; *Roddy v. Missouri Pac. Ry. Co.*, 104 Mo. 234; 24 Am. St. Rep. 333, and cases cited.)

In *Savings Bank v. Ward*, *supra*, the general rule above adverted to is exhaustively discussed, and its limitation stated by Mr. Justice Clifford for the court. That was a case where a third party sought to maintain an action against the attorney for damages resulting to him from relying upon the correctness of a defective certificate of title to a piece of real estate furnished by the attorney to a client, upon the faith of which the plaintiff had loaned money on the property. In holding that the plaintiff could not maintain the action, it is there said: "Beyond all doubt the general rule is, that the obligation of the attorney is to his client, and not to a third party, and, unless there is something in the circumstances of this case to take it out of that general rule, it seems clear that the proposition of the defendant must be sustained. (Shearman and Redfield on Negligence, sec. 215.) Conclusive support to that rule is found in several cases of high authority. (*Fish v. Kelly*, 17 Com. B., N. S. 194.)" And after commenting upon the case of *Fish v. Kelly*, *supra*, and the case of *Robertson v. Fleming*, 4 Macq. 167, 209, from the latter of which cases Lord Wensleydale is quoted as saying that "he only who, by himself or another as his agent, employs the attorney to do the particular act in which the alleged neglect has taken place, can sue him for that neglect, and that that employment must be affirmed in the declaration of the suit in distinct terms," the learned justice proceeds: "Analogous cases, involving the same principle, are quite numerous, a few of which only will be noticed. They show to a demonstration that it is

not every one who suffers a loss from the negligence of another that can maintain a suit on such grounds. On the contrary, the limit of the doctrine relating to actionable negligence, says Beasley, C. J., is, that the person occasioning the loss must owe a duty, arising from contract or otherwise, to the person sustaining such loss. Such a restriction on the right to sue for a want of care in the exercise of employments or the transaction of business is plainly necessary to restrain the remedy from being pushed to an impracticable extreme. There would be no bounds to actions and litigious intricacies if the ill effects of the negligence of men may be followed down the chain of results to the final effect. (*Kahl v. Love*, 37 N. J. L. 5, 8.) . . . Cases where fraud and collusion are alleged and proved constitute exceptions to that rule, and Parke, B., very properly admits, in the following case, that other exceptions to it exist which are as sound in principle as the judgments which establish the rule. (*Longmeid v. Holliday*, 6 Ex. 761-67.) Examples of the kind are given in that case, two of which deserve to be noticed, as they have been urged in argument to disprove the rule; but they cannot have any such effect, for the plain reason that they stand in many respects upon a different footing. These cases, say the court in that opinion, occur where there has been a wrong done to the person, for which he would have a right of action, though no such contract had been made; and the court gives as an illustration the patient injured by improper medicines prepared by an apothecary, or one unskillfully treated by a surgeon, where both would be liable to the injured party even if the father or friend of the patient contracted with the wrongdoer."

In *Roddy v. Missouri Pac. Ry. Co.*, *supra*, it is said: "The right of a third party to maintain an action for injuries resulting from a breach of contract between two contracting parties has been denied by the overwhelming weight of authority of the state and federal courts of this country, and the courts of England. To hold

that such actions could be maintained would not only lead to endless complications in following out cause and effect, but would restrict and embarrass the right to make contracts, by burdening them with obligations and liabilities to others, which parties would not voluntarily assume." (Citing *Winterbottom v. Wright*, 10 Mees. & W. 109, and a large number of other cases.) "The rule is put upon two grounds, either of which is unquestionably sound. One ground is given by the court in the opinion in *Winterbottom v. Wright*, *supra*, as follows: 'If we were to hold that plaintiff could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty.' The other ground is thus stated in the New Jersey case above cited: 'The object of parties in inserting in their contracts specific undertakings, with respect to the work to be done, is to create an obligation *inter sese*. These engagements and undertakings must necessarily be subject to modifications and waiver by the contracting parties. If third persons can acquire a right in a contract, in the nature of a duty to have it performed as contracted for, the parties will be deprived of control over their own contracts. Plaintiff, not being a party to the contract, cannot maintain this action on account of injuries resulting from any breach of duty defendant owed Pickle, arising purely out of the terms of the contract between them.'"

No authority has been brought to our notice contravening the rule as stated in the foregoing citations. Some, which at first glance might be so taken, will be found upon analysis to fall within one or the other of the exceptions noted, and not to infringe upon the general doctrine. Within such class fall the cases relied upon by plaintiff to support his general right to maintain the action. This case comes strictly within the general doctrine as above stated. No fact is alleged bringing it within any of the exceptions thereto. It is

not alleged that defendant did the act charged maliciously, or through any evil intent, or with any fraudulent purpose, or that he did it in any affirmative sense. The complaint proceeds solely upon the theory that it was through negligence arising either from ignorance or carelessness, or both; and this, although it may be conceded that the complaint discloses an instance of the grossest ignorance on the one hand, or unpardonable carelessness on the other, and shows very grievous injury to plaintiff as a result, does not, within the principles above announced, make a case entitling the plaintiff to maintain the action.

It is claimed, however, that the action can be maintained under the rule expressed in section 1559 of our Civil Code, that a contract made by one person with another for the benefit of a third person may be enforced by the latter, the argument being that the employment of defendant by plaintiff's mother to draw her will was clearly for plaintiff's benefit, inasmuch as the latter was one of the objects of her bounty, as expressed in her will; and a number of cases are cited which are supposed to bring the case within that rule. But in our judgment that provision has no application to this case. It is intended to apply to instances where the contract is made *expressly* for the benefit of the third person, not where the third person is or may be merely incidentally or remotely benefited as a result of such contract. Such is the language of the code, and such will be found to be the application of the doctrine in all the cases cited by counsel, or which have come to our attention. The terms of section 1559 are: "A contract made *expressly* for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it." This rule, we are told by Mr. Pomeroy (Remedies and Remedial Rights, sec. 139), was originally adopted prior to the reformed procedure, being based partly upon considerations of convenience and partly upon a liberal construction of the nature of the contract, and the purpose of which was to avoid circuitry of action, and to

enable the real party in interest to sue. That author proceeds to give us illustrations of its application, and each instance given is a case where the contract was in express terms made for the benefit of the third party, and by reason of which the latter became the real party in interest. No such application of the doctrine as is here contended for is even remotely hinted at. The contract between the plaintiff's mother and the defendant, which was the subject of the breach, cannot be said in any legal sense to have been expressly made for plaintiff's benefit. It was a contract for employment of defendant's services as an attorney to draft the will of Mrs. Buckley, the immediate purpose of which was for the benefit of the latter, to enable her to make disposition of her estate in accordance with her desire. Remotely, it is true, she intended plaintiff to be benefited as a result of such contract, by providing for him in her will. Such provision, however, could create no vested right in plaintiff until the death of the testatrix. Until that event the will remained purely ambulatory, and the provision for plaintiff could be at any time changed or withdrawn. It therefore created a mere possibility in plaintiff—not a right which made him in law a privy to the contract. To hold that by reason of the provision for plaintiff in the will the contract is to be considered one made expressly for his benefit is to confound the terms of the will with those of the contract. The latter alone was the subject of the breach, and by defendant's negligence in carrying out that contract the testatrix alone suffered legal injury. Although the ultimate consequential injury to plaintiff would appear to have been great, it was, so far as defendant is concerned, *damnum absque injuria*, against which the courts are powerless to relieve. In this view, it is not material to notice the other objections made to the complaint. The demurrer having been properly sustained, it follows that the judgment should be affirmed.

It is so ordered.

[No. 15992. Department Two.—December 10, 1895.]

**L. S. CAVALLARO, RESPONDENT, v. TEXAS AND  
PACIFIC RAILWAY COMPANY, APPELLANT.**

**COMMON CARRIER—DELIVERY OF GOODS TO WRONG PARTY.**—Where goods shipped to a consignee were delivered by a common carrier to a third party, who personated the consignee, and received, receipted for, and paid the freight thereon, whereby the goods were lost to the shipper, the carrier so misdelivering the goods is liable to the shipper for their value.

**ID.—INTERMEDIATE CARRIAGE—LIABILITY OF FINAL CARRIER.**—Where goods are shipped through several carriers upon a through shipment, the final carrier is liable to the owner under its common-law liability, whether there was an express contract between it and the shipper, or only such agreement as the law implies from the acceptance of the goods directed to the consignee at the end of its route.

**ID.—MISDELIVERY NOT EXCUSABLE.**—No circumstances of fraud, imposition, or mistake will excuse a common carrier from responsibility for delivery to the wrong person; but the law exacts of him absolute certainty that the person to whom the delivery is made is the party rightfully entitled to the goods.

**ID.—CHANGE OF LIABILITY TO THAT OF WAREHOUSEMAN—NOTICE TO CONSIGNEE ESSENTIAL.**—A common carrier cannot change his liability to that of a warehouseman as to goods which have arrived at the place of consignment, without giving notice to the consignee of the arrival, and where the notice is given by mistake to the wrong person, it cannot have the effect to change the liability of the carrier to that of a warehouseman.

**ID.—LAWS OF ANOTHER STATE—PRESUMPTION.**—In the absence of proof to the contrary, the laws of another state will be presumed to be the same as those of California, and this presumption extends to statutory law, as well as to the common law.

**ID.—RULE REQUIRING NOTICE—DECLARATORY STATUTE.**—The rule of the statute of California requiring notice to be given by the carrier to a consignee is a declaration of the law as it existed prior to that statute in a majority of the states and in England.

**ID.—PLACE OF DELIVERY—FREIGHT CONSIGNED GENERALLY.**—Where freight is consigned to the consignee at the terminus of the route generally, without specifying delivery at a place of business, the station or depot of the railroad is the place of delivery.

**ID.—EXONERATION OF CARRIER—UNINDORSED BILL OF LADING.**—A carrier is not exonerated from liability by delivery of the goods to a holder of the bill of lading where it is unindorsed and not payable to bearer, and where such holder is not the consignee, and not entitled to the delivery of the goods.

**ID.—MISDELIVERY OF GOODS BY WAREHOUSEMAN.**—A carrier acting as a warehouseman is not authorized to deliver goods to a stranger who presents an unindorsed bill of lading, and who is not identified as the consignee, or as having any right to the bill of lading or to the goods.

**INSTRUCTIONS—GENERAL EXCEPTION.**—A general exception to each and all of the instructions given by the court of its own motion is not sufficient to authorize a review of the instructions so given.

**ID.—EXCEPTION TO SPECIAL INSTRUCTIONS.**—The rule that a general objection to instructions as not sufficient has no application to special instructions asked by the parties, and given or refused by the court, concerning which a general exception is sufficient.

**ID.—NEGOTIABILITY OF WAREHOUSE RECEIPTS AND BILLS OF LADING.**—Warehouse receipts are negotiable unless they have the word "non-negotiable" printed in red ink across their face, and when negotiable an indorsement of the receipt operates as a valid transfer of the property represented by the receipt; and there is no difference between a warehouse receipt and a bill of lading in this respect.

**ID.—REPEATED DELIVERIES TO WRONG PERSON.**—In the absence of any act or conduct on the part of the consignor whereby he is estopped, the carrier cannot be relieved from repeated deliveries to the wrong person, upon the ground that the same person who presented himself as the consignee of subsequent shipments, lived and carried on business at the street and number at which similar business was carried on by the true consignee.

**ID.—DISTINCTION BETWEEN SPECIAL AND GENERAL CONSIGNMENT OF GOODS.**—Different considerations arise in cases where goods are consigned to a given number and street, and are there delivered to a person apparently the one to whom they were consigned, and in cases where the goods are consigned generally without specific designation.

**ID.—PLEADING—COUNT AGAINST COMMON CARRIER—RECOVERY AGAINST CARRIER AS WAREHOUSEMAN.**—Where the defendant, whether regarded as a common carrier or as a warehouseman, is liable for misdelivery of the goods, a plaintiff who has counted upon the liability of defendant as a common carrier may recover against such carrier as a warehouseman.

**APPEAL** from a judgment of the Superior Court of Santa Clara County and from an order denying a new trial. **W. G. LORIGAN**, Judge.

The facts are stated in the opinion.

**H. V. Morehouse**, for Appellant.

An express contract with the Atlantic & Pacific Railroad Company does not prove an implied contract with this defendant. (*Cohen v. Express Co.*, 53 Ga. 130.) The court erred in instructing the jury, in effect, that the bill of lading not being indorsed, the delivery was a misdelivery. When a bill of lading is made to bearer, or equivalent terms, a simple transfer by delivery is sufficient. (Civ. Code, sec. 2128; Porter on Bills of Lading, secs.

500-04; *Bank of Rochester v. Jones*, 4 N. Y. 497; 55 Am. Dec. 290.) Possession of the bill of lading, though not indorsed, was evidence that the holder was the true owner and entitled to the possession. (*Holmes v. German Security Bank*, 87 Pa. St. 525; *Holmes v. Bailey*, 92 Pa. St. 57; *Merchants' Bank v. Union R. R. etc. Co.*, 69 N. Y. 373; 8 Hun, 249; *City Bank v. Rome etc. R. R. Co.*, 44 N. Y. 136.) Leaving a notice with the person in charge of a man's place of business is sufficient. (*Hirshfeld v. Central Pac. R. R. Co.*, 56 Cal. 484; *Constable v. National etc. Co.*, 154 U. S. 51.) As the contract in the bill of lading was that if the goods were not taken within business hours on the day of arrival, they should be stored at the owner's risk, the liability of defendant was that of a warehouseman. (*Collins v. Burns*, 63 N. Y. 1; *Tarbell v. Royal Exch. Shipping Co.*, 110 N. Y. 170; 6 Am. St. Rep. 350; *Wilson v. California Cent. R. R. Co.*, 94 Cal. 166.) If the carrier delivers to the place indicated, or does what is equivalent to a delivery there, he does all that he is bound to do. (Civ. Code, sec. 2131; *Glidden v. Lucas*, 7 Cal. 29; *M'Kean v. M'Ivor*, L. R. 6 Ex. 36.)

*William P. Veuve*, for Respondent.

Proof that plaintiff delivered the freight to the Atlantic & Pacific Railroad Company, and that thereafter it was delivered to defendant, who accepted and carried it and delivered it to an impostor, entitles the plaintiff to recover. (*Southern Exp. Co. v. Urquhart*, 52 Ga. 142; *O'Rourke v. Chicago etc. R. R. Co.*, 44 Iowa, 526.) The bills of lading in question are not to bearer, and do not pass title by delivery simply. (Civ. Code, secs. 2128, 2131; Porter on Bills of Lading, sec. 493.) The law exacts of the carrier absolute certainty as to the person to whom delivery is to be made, and puts on him the entire risk of mistakes in this respect. (*Adams v. Blankenstein*, 2 Cal. 413; 56 Am. Dec. 350; *Douglas v. People's Bank of Kentucky*, 86 Ky. 176; 9 Am. St. Rep. 276; *Louisville etc. R. R. Co. v. Barkhouse*, 100 Ala. 543; *National Bank v. Atlanta etc. Ry. Co.*, 25 S. C. 216; 3 Wood's Railway



Law, secs. 445, 446, and cases cited; *McEntee v. New Jersey Steamboat Co.*, 45 N. Y. 34; 6 Am. Rep. 28; *Rogers v. Weir*, 34 N. Y. 463; *Ball v. Liney*, 48 N. Y. 6; 8 Am. Rep. 511; Hutchison on Carriers, sec. 344, et seq., and cases cited.) In order to reduce defendant's liability to that of a warehouseman, there should have been personal service of notice on the consignee. (Civ. Code, sec. 2120.) In the absence of any showing that the law of Louisiana is different, it will be presumed to be the same as that of this state. (*Palmer v. Atchison etc. R. R. Co.*, 101 Cal. 187.)

SEARLS, C.—This is an appeal from a final judgment in favor of plaintiff for twelve hundred and fifty-five dollars and ninety-six cents and costs, and from an order denying a motion of defendant for a new trial.

Defendant is a railroad corporation organized and existing under and by virtue of the laws of the United States, and is a common carrier of freight and passengers from El Paso, in the state of Texas, by the way of Fort Worth, to New Orleans, in the state of Louisiana. Plaintiff is a citizen and resident of the state of California.

On the twenty-fourth day of October, 1894, the plaintiff shipped from Oakland, California, forty barrels of white wine, by the Atlantic & Pacific Railroad Company, and on the twenty-fifth day of October he shipped from San Jose, California, by the same company, forty-one barrels of red wine, all consigned to "V. Lo Secco, New Orleans, La.," for which two shipments plaintiff received from the said Atlantic & Pacific Railroad Company separate duplicate bills of lading in the usual form.

One set of these duplicate bills of lading was forwarded by the plaintiff per registered letters addressed "V. Lo Secco, 29 Hospital street, New Orleans," and United States registered return receipts were in due time returned to him at San Jose, California, signed "V. Lo Secco, J. Lo Secco."

The goods were forwarded under some regulations among the several companies, over the Southern Pacific Coast Line to Mojave; Atlantic & Pacific to Albuquerque, thence by Atchison, Topeka & Santa Fe to Purcel, by Gulf Colorado & Santa Fe to Fort Worth, and thence by the Texas & Pacific, the defendant herein, to New Orleans, Louisiana.

There was evidence touching the proportion of freight received by each of these connecting companies, and as to their traffic association. The goods were received by the defendant at Fort Worth and shipped thence to New Orleans, where the freight was collected by said defendant and the goods delivered.

There is no dispute as to these facts, and the crucial question is, Were they delivered to the consignee, and, if not, was the defendant guilty of such negligence as renders it liable in damages for the value of the property?

There was testimony tending to establish the following facts: V. Lo Secco, the consignee, was, and for many years had been, a commission merchant in New Orleans, whose principal business was receiving consignments of oranges and other fruit, which he sold on commission, and usually at public auction. He owned the premises at 29 Hospital street, and had his office in the rear of the building. The front part of the building was occupied by D. Lo Secco, a nephew of V. Lo Secco, as a grocery and saloon.

V. Lo Secco was a man of wealth and reputation, say sixty years of age, six feet high, weighing from two hundred to two hundred and fifty pounds, with gray hair. D. Lo Secco was a rather small man, say twenty-five to thirty years of age, with black hair, etc. V. Lo Secco could not write, and never ordered the wine, or had any communication with plaintiff, but the latter knew the former by reputation, and shipped the goods to him to be sold on commission for account of plaintiff. One consignment reached New Orleans November 9, 1892, and was delivered November 25, 1892. The

other arrived November 4, 1892, and was delivered December 6, 1892.

When the first consignment reached its destination, defendant sent its messenger to 29 Hospital street, to notify the consignee, and, in answer to interrogatories, a man whom the messenger describes, and who was doubtless D. Lo Secco, professed to be such consignee, and in the name of V. Lo Secco signed an acknowledgment of notice of the arrival of the consignment. The same thing was repeated in the same manner upon the arrival of the second consignment.

A man answering to the description of D. Lo Secco, and not answering to the description of V. Lo Secco, called at the office of defendant with one of the bills of lading November 25th, claimed to be the consignee, paid the freight, receipted for the goods in the name of V. Lo Secco, and took them away.

The same thing was repeated with the other consignment, December 6th, except that the bill of lading was not presented to defendant. There was evidence that the signature "V. Lo Secco" was in the handwriting of D. Lo Secco. D. Lo Secco disappeared from New Orleans soon after this transaction, and has never returned.

The consignee, V. Lo Secco, knew nothing whatever of the shipments to him, never received the bills of lading, or any notice of the shipment, and appears to have had no knowledge whatever of the transaction until after the goods disappeared.

The witnesses for the defense spoke of knowing one V. Lo Secco in connection with the shipment and delivery of the wine, but in every instance in describing him they gave a description of D. Lo Secco, and not one applying to V. Lo Secco.

The evidence is clearly to the effect that D. Lo Secco personated the consignee of the goods, V. Lo Secco, received, receipted for, and paid the freight thereon, and then disappeared. The evidence was amply sufficient on the head indicated to warrant the jury in finding a verdict in favor of plaintiff.

A number of contentions of appellant, without taking them up *seriatim*, may be answered in this wise: It is established law of England: 1. That when the carrier accepts for carriage goods directed to a destination beyond its own route, it assumes by the very act of acceptance, in the absence of any express contract on the subject, the obligation to transport them to the place to which they may be directed. This was first decided in what is known as the "Muschamp case" (*Muschamp v. Lancaster etc. Ry. Co.*, 8 Mees. & W. 421), and has been ever since steadily adhered to. 2. As an apparent corollary of the first proposition, the English courts have also held that, in all cases included therein, the first carrier becomes exclusively responsible for the carriage and safety of the goods to their destination, and, no matter by whom injured or lost, the first carrier alone can be sued by the aggrieved party, and any attempt to hold the subsequent or connecting carrier liable must, notwithstanding the loss may have occurred through its negligence, fail for want of privity of contract between such carrier and the injured party. (Hutchinson on Carriers, secs. 146, 147.)

Upon the first of the foregoing propositions the American courts are divided. The majority of them, however, hold against the English doctrine, as unjust to the carrier and as unnecessary upon grounds of public policy, and assert the true rule to be that in the absence of any contract, except such as is implied from the acceptance of the goods for carriage, the obligation of the carrier extends only to the end of his route, and a proper delivery there to the next succeeding carrier to further or complete the carriage. And in order to be bound further a positive agreement, either express or implied, is necessary. And this is called the American rule. (Hutchinson on Carriers, sec. 149, and cases cited.)

Upon the second proposition the courts of the United States, both federal and state, are believed to be, with a single exception, a unit in holding that either with or without a contract under which the first carrier becomes

liable for loss or injury to goods until they reach their destination, the owner may seek redress from any intermediate carrier who is in fault. The exception alluded to is the state of Georgia, and in that state the English rule is now mainly abrogated by statute.

The theory upon which the connecting carrier is held liable for his own default or misfeasance to the owner is based upon the ground that the receiving carrier is the agent of the owner to forward and deliver to the next succeeding or connecting carrier, who in turn becomes the agent of the principal, and not the subagent of the first agent, and hence liable.

Whatever may be the basis of the doctrine, it is one of well nigh universal application in this country, and, as is said by Hutchinson on Carriers, at section 150: "The rule which allows the action against the carrier in fault, as well as against the one who is primarily responsible, certainly commends itself upon grounds of both justice and convenience, and, with the above exception [Georgia], is the universal law of this country."

The complaint in this case avers, among other things, the delivery of the property to defendant as such common carrier, and its receipt upon the agreement aforesaid (that is to say, to carry the same to New Orleans and there deliver it to V. Lo Secco), and its misdelivery, whereby it was lost to plaintiff. If the defendant, as a common carrier, received property consigned to a person in New Orleans to be carried over its road terminating in that city, it became liable to the owner for negligence or misfeasance, in doing so, under its common-law liability, whether there was an express contract or only such agreement as the law implies. In *Church v. Atchinson etc. R. R. Co.*, 1 Okla. 44, relied upon by appellant, there was no allegation in the complaint that the goods were ever delivered to or received by the defendant.

The last duty required of the common carrier is that of delivery. This is a duty imposed upon him by law; as soon as he accepts the goods, and whether so expressed

or not, it becomes a part of his contract. He must not only deliver goods intrusted to him to carry, but becomes also responsible for their proper delivery. (Hutchinson on Carriers, sec. 338.) The same author, at section 344, says: "No circumstances of fraud, imposition, or mistake will excuse the common carrier from responsibility for a delivery to the wrong person. The law exacts of him absolute certainty that the person to whom the delivery is made is the party rightfully entitled to the goods, and puts upon him the entire risk of mistakes in this respect, no matter from what cause occasioned, however justifiable the delivery may seem to have been, or however satisfactory the circumstances or proof of identity may have been to his mind; and no excuse has ever been allowed for a delivery to a person for whom the goods were not directed or consigned. . . . If, however, the delivery be made to the wrong person, whether by an innocent mistake or through fraud practiced upon the carrier, such wrongful delivery will be a conversion." (*Adams v. Blankenstein*, 2 Cal. 413; 56 Am. Dec. 350.)

The contention of appellant that its liability as a common carrier had ceased before the delivery, and that it became and was at the date of such delivery only liable as a warehouseman, cannot be maintained.

Under section 2120 of our Civil Code, a common carrier may reduce his liability to that of a warehouseman, as to goods which have arrived at the place of consignment, by giving notice to the consignee of the arrival, and, if the place of residence or business of such consignee is not known, the notice may be given by letter dropped in the nearest postoffice.

Appellant sought to serve notice in the present case upon the consignee in person, but by mistake and through the fraud of D. Lo Secco the notice was served upon him and not upon V. Lo Secco, the consignee. This was no notice to the consignee, and did not have the effect of changing the liability of the carrier to that of a warehouseman. (*Wilson v. California Cent. R. R. Co.*, 94 Cal. 166.)

If it be claimed that the determination in this case turns upon the law of the state of Louisiana, and not upon that of California, the answer must be: 1. In the absence of proof to the contrary, the laws of another state will be presumed to be the same as our own, and this presumption extends to statutory as well as to the common law. (*Hickman v. Alpaugh*, 21 Cal. 225; *Shumway v. Leakey*, 67 Cal. 460; *Marsters v. Lash*, 61 Cal. 624; *Mortimer v. Marder*, 93 Cal. 172.) 2. The rule requiring notice to be given is but a declaration of the law as it existed prior to the statute in a majority of the states and in England. (*Wilson v. California Cent. R. R. Co.*, *supra*; *Hutchinson on Carriers*, secs. 373, 374, and notes.)

This is not a case of the delivery of goods at the residence or place of business of the consignee. The freight was consigned to V. Lo Secco, New Orleans, Louisiana, and hence the station or depot of the defendant was the place of delivery, and the fact that D. Lo Secco, to whom the goods were delivered, had procured and presented a duplicate of the bill of lading to defendant, which was not assigned or indorsed by either the consignor or consignee, was no excuse or justification to defendant for delivering the goods to him without further identification.

"A carrier is exonerated from liability for freight by delivery thereof, in good faith, to any holder of a bill of lading therefor, properly indorsed, or made in favor of the bearer." (Civ. Code, sec. 2131.)

This section of the code has no application to the case in hand, because the bill of lading *was not made to bearer, and was not indorsed by the recipient to whom it was issued*. Numerous questions arise, and some of them difficult ones, in relation to assignments, mortgages, hypothecation, etc., of bills of lading. None of these questions are involved here, as there is no evidence in the record upon which to predicate them, except the mere fact that D. Lo Secco possessed and presented the defendant an unindorsed bill of lading, which did not, and could not under our law, give him

any title to the freight therein described. (Civ. Code, sec. 2127.)

The uncontradicted evidence of the witnesses Leland and Sterne, supplemented by the deposition of Toomey, and by the bills of lading introduced by consent, and the way bills were sufficient to authorize the jury to conclude that the through bills of lading were authorized by the defendant.

The court, upon its own motion, instructed the jury at considerable length. The only objection or exception to the instructions thus given is as follows: counsel for defendant said: "We desire, if your honor please, to save an exception to each, every, and all of the instructions given by the court of its own motion."

It is objected, on the part of respondent, that this exception is not sufficiently specific to warrant this court in scrutinizing the instructions given by the court upon its own motion. The current of authority seems to render it imperative that we sustain the objection of respondent, and decline to examine and pass upon the legality of the court's instructions.

The theory of the rulings is, that exceptions to the charge of a court to the jury ought to point out specifically the portions excepted to, and be made at the time of trial, in order that the judge may have an opportunity, before the jury retires, to correct any error he may have inadvertently fallen into in drawing up the charge in the hurry and perplexities of the trial. (*Hicks v. Coleman*, 25 Cal. 122; 85 Am. Dec. 103; *Sill v. Reese*, 47 Cal. 294; *Rider v. Edgar*, 54 Cal. 127; *Shea v. Potrero etc. R. R. Co.*, 44 Cal. 414; *Brown v. Kentfield*, 50 Cal. 129; *Robinson v. Western Pac. R. R. Co.*, 48 Cal. 409; *Sukeforth v. Lord*, 87 Cal. 399).

The doctrine of these cases, and of others of like import, have established a rule of practice in this state from which we do not feel at liberty to depart. This rule, of course, has no application to the special instructions asked by the parties and given or refused



by the court, concerning which a general exception has always been held sufficient.

There was no error in the refusal of the court to give the instructions asked on behalf of the defendant, numbered from 1 to 7, both inclusive. The first of these instructions involved the proposition that if the two shipments of wine reached New Orleans on the ninth and fifteenth days of November, 1892, respectively, and were not called for or demanded until the twenty-first day of November and the sixth day of December, respectively, then the defendant's liability, if any, was not that of a common carrier, but that of a warehouseman, and that plaintiff could not recover.

The answer to this proposition is two-fold: 1. The evidence showed clearly that V. Lo Secco, the consignee, had no notice whatever, either in fact or such as is provided by statute, of the arrival of the goods, and until notice thereof defendant held the same as a common carrier and subject to its liability as such; 2. Even as a warehouseman, defendant was not authorized to deliver the goods to a stranger who presented a bill of lading not indorsed, and who was not identified in any way as the consignee, or as having any right to the bill of lading, or the goods of which it was a symbol.

Warehouse receipts are negotiable unless they have the word "non-negotiable" printed in red ink across their face, and when negotiable an indorsement of the receipt operates as a valid transfer of the property represented by such receipt. (Stats. 1877-78, p. 949.)

A transfer of a warehouse receipt in good faith, etc., passes the title to the goods covered by the receipt. (*Davis v. Russell*, 52 Cal. 611; 28 Am. Rep. 647.) There is no difference between a warehouse receipt and a bill of lading in this respect. (*Davis v. Russell*, *supra*; *Bishop v. Fulkerth*, 68 Cal. 607; Civ. Code, secs. 2127-31.)

The second instruction is to the effect that the defendant, in the absence of other instructions, had a right to deliver the first shipment of wine to the person who presented the bill of lading and surrendered it, and the

third is to the effect that if the same person who delivered the bill of lading presented himself as the true consignee of the second shipment of wine, and in both instances claimed to be the true consignee and so receipted for the wine, and paid the freightage thereon, and that the bills of lading had been sent by the consignor to V. Lo Secco, and the person who claimed and received the wine lived and carried on business, including the selling of wines at 29 Hospital street, New Orleans, and that defendant notified him thereof of its arrival, then the jury should find for the defendant.

In the absence of some act or conduct on the part of the consignor whereby he is estopped, of which there is no evidence, these instructions are not an embodiment of the law, unless an unindorsed bill of lading, in the hands of a stranger thereto, is sufficient evidence of ownership to warrant the delivery by a common carrier to the person so holding such bill of lading. We have hereinbefore stated that such a delivery does not excuse the carrier.

The fifth instruction is covered by what has been said of the third and fourth.

The sixth instruction is covered by the instructions given by the court, and it was not necessary to repeat it.

The seventh instruction goes upon the false theory that the goods were consigned to 29 Hospital street, New Orleans, when they were not in fact so consigned, and then seeks to gauge the duty of the defendant on that hypothesis. This was not proper to be done.

Different considerations frequently arise in cases where goods are consigned to a given number and street, and are there delivered to a person apparently the person to whom they are consigned, but, in this case, questions of that character are not properly involved.

We are of opinion that the defendant, whether regarded as a common carrier or as a warehouseman, is liable for the misdelivery of the goods in question, and that the plaintiff who had counted upon the liability of

defendant as a common carrier may, in every proper case, recover against such carrier as a warehouseman. (*Hoyt v. Nevada County etc. R. R. Co.*, 68 Cal. 644; *Wilson v. California Cent. R. R. Co.*, *supra.*)

The judgment and order appealed from should be affirmed.

HAYNES, C., and BRITT, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

McFARLAND, J., TEMPLE, J., HENSHAW, J.

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[No. 16031. Department Two.—December 10, 1895.]

J. J. RAUER, RESPONDENT, v. DAVID FAY, APPELLANT.

**STREET WORK—PRIVATE CONTRACT—ACTION BY ASSIGNEE—PLEADING—EVIDENCE—VARIANCE—UNCERTAINTY OF CONTRACT.**—In an action to foreclose a lien for street work under a private contract, which had been assigned to the plaintiff, where the contract and the contents of the lien are pleaded merely according to their legal effect, and the complaint counts upon a contract to grade the south half of a street between certain cross streets, a contract offered in evidence which merely provides for the grading of one-half of the street, but is silent as to which half is to be graded, it is too uncertain and indefinite to be admissible in evidence under the allegations of the complaint.

**Id.—RIGHT OF LIEN NOT ASSIGNABLE—WORK DONE BY ASSIGNOR—OMISSION OF MATERIAL FINDING.**—Although a perfected lien may be assigned, the mere right to a lien in the present or future is not assignable; and in an action by an assignee to foreclose a lien, where the evidence established without contradiction that part of the work of grading upon which plaintiff claims a lien was performed by his assignor before the assignment, and the answer raises an issue upon that question, such issue is material, and a failure to find thereon is ground of reversal of a judgment in favor of the assignee.

**Id.—CONDITIONAL NEW TRIAL ORDER—REMISSION OF PART OF RECOVERY—SILENCE OF RECORD—PRESUMPTION.**—Where the court below denied a motion for a new trial upon condition that plaintiff should remit ten per cent of the amount of his recovery, if the record is silent as to the cause of the remission, it cannot be presumed that the reduction was on account of labor performed by the plaintiff's assignor, where the evidence shows that a portion of the work was never completed, and the remission might have been made on that account.

- ID.—EVIDENCE—RELEASE BY CONTRACTOR AT TIME OF CONTRACT.—A paper executed simultaneously with the contract relied upon by the plaintiff, in which the contractor certified that he had no claim upon the defendant for any work performed on the street in question by another person named, or by himself or assigns, in doing the balance of grading on the street, is admissible in evidence for the purpose of showing that it was the intention of the contractor to release the plaintiff from all liability.
- ID.—OBJECT OF CONTRACT—NOMINAL SIGNATURE—KNOWLEDGE OF CONTRACTORS—FRAUD—PROVINCE OF COURT.—If the contract was signed by the defendant only as a nominal party to enable the parties in interest to secure a sufficient number or proportion of the land-owners on the block to obtain a permit from the superintendent of streets to make the improvement, and this was done with the knowledge and consent of the other contractors, it would not be a fraud upon them; but if it was a secret or side agreement between the contractor and defendant, made in fraud of the rights of the other contracting parties, the court may investigate and determine that question.
- ID.—RIGHTS OF ASSIGNEE—KNOWLEDGE OF RELEASE.—An assignee of the contract for street work takes such contract *cum onere*, subject only to the duty of defendant to notify him of any conditions not specified in the contract itself, and the mere fact that the plaintiff was not aware of a release of the defendant at the time he took an assignment of the contract is of no moment.
- ID.—NOTICE OF LIEN—SUBSTANTIAL COMPLIANCE WITH STATUTE.—Where a notice of lien as filed complies substantially with the requirements of the statute it is sufficient.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. WALTER H. LEVY, Judge.

The facts are stated in the opinion.

*William H. Chapman*, for Appellant.

It is the duty of the trial court to find upon all the material issues made by the pleadings, whether evidence be introduced or not, and if there is no finding on a material issue the judgment cannot be supported. (*Speegle v. Leese*, 51 Cal. 415; *Golson v. Dunlap*, 73 Cal. 161; *Leviston v. Ryan*, 75 Cal. 294; *Monterey County v. Cushing*, 83 Cal. 510.) Failure to make findings upon a material issue is proper ground for a new trial, as such failure is considered to be a decision "against law." (*Brison v. Brison*, 90 Cal. 328; *Langan v. Langan*, 89 Cal. 195; *Spotts v. Hanley*, 85 Cal. 168; *Knight v. Roche*, 56

Cal. 15.) Several contracts relating to the same matters between the same parties, and made parts of substantially the same transactions, are to be taken together. (Code Civ. Proc., sec. 368; Civ. Code, sec. 1642; *Uhlhorn v. Goodman*, 84 Cal. 189; *Brickell v. Batchelder*, 62 Cal. 633; *St. Louis Nat. Bank v. Gay*, 101 Cal. 286.) No recovery can be had on a lien that does not state the actual contract. (*Reed v. Norton*, 90 Cal. 590; *Wagner v. Hansen*, 103 Cal. 107; *Jones v. Shuey* (Cal., Apr. 3, 1895), 9 Cal. Dec. 179.) A lien filed by an assignee of the contract who did the work is void. (Code Civ. Proc., Sec. 1202; *Mills v. La Verne Land Co.*, 97 Cal. 254; 33 Am. St. Rep. 168; *McCrea v. Johnson*, 104 Cal. 224.)

*Shadburne & Herrin*, for Respondent.

The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument. (Civ. Code, secs. 1625, 1698; *Brady v. Bartlett*, 56 Cal. 350; *Himmelmänn v. Reay*, 38 Cal. 163; *Nolan v. Reese*, 32 Cal. 484; *Chambers v. Satterlee*, 40 Cal. 520; *Himmelmänn v. Hoadley*, 44 Cal. 214.) Failure to find upon a fact that would not affect the judgment is harmless. (*Morrison v. Stone*, 103 Cal. 94.) The statement in the lien of the terms of the contract was sufficient, a substantial compliance with the statute being all that is required. (*Blackman v. Mariscano*, 61 Cal. 638; *Tredinnick v. Red Cloud Min. Co.*, 72 Cal. 80.)

SEARLS, C.—This is an action to foreclose a lien for street work performed under a private contract, and in which a lien was filed pursuant to section 1191 of the Code of Civil Procedure.

Plaintiff had judgment, from which, and from an order denying his motion for a new trial, defendant appeals.

The complaint is in the usual form; pleads a contract between defendant and one J. G. Duffy, the assignment

thereof to plaintiff by Duffy, the performance of the work by plaintiff, and the filing of the lien, etc. The contract and the contents of the lien are pleaded according to their legal tenor and effect, and not *in haec verba*.

The complaint counts upon a contract to grade the south half of Chestnut street, from Jones street to Leavenworth street, San Francisco.

The answer, after denying a number of the allegations of the complaint, proceeds to aver that prior to April, 1892, defendant had procured to be graded all the portion of Chestnut street in front of his property by third parties, and had paid therefor; that portions of the street in front of property of other parties remained ungraded; that Duffy desired defendant to sign a contract with him for the grading of the whole of Chestnut street, from Jones to Leavenworth street, for the purpose of enabling him, the said Duffy, to procure a permit from the superintendent of public streets, etc., of said city and county for doing said unfinished grading; that Duffy thereupon agreed that if defendant would sign said contract for said purpose, that he, the said defendant, should not be held liable for the payment of any portion of the price of such grading; that thereupon defendant signed the contract for said purpose only, and that said Duffy then and there made, executed, and delivered to defendant a full acquittance and discharge from any and all liability on said contract by reason of defendant signing the same, etc., stating, in terms, that the grading on the south side of the street in front of defendant's property was already done, and that plaintiff was fully informed of all the above facts before he performed any work upon the street.

The answer further alleges that the contract, in terms, required the grading of the whole of the street, but that prior thereto the entire north half thereof had been graded by third parties.

Defendant further alleges that the assignment of the contract by Duffy to plaintiff was as collateral security for a loan, and that the former still has an interest

therein; that no work was done under the contract in front of defendant's property, etc.

The answer also avers that Duffy commenced the work of the unfinished grading, and finished one-half thereof before the assignment of the contract to plaintiff.

The record in the case bristles with irregularities, uncertainties, and errors, for which the judgment and order appealed from must be reversed.

1. The complaint and notice of lien, as filed, are predicated upon a contract for grading the south half of Chestnut street, between Jones and Leavenworth.

There was a written contract entered into April 25, 1892, between J. G. Duffy, as a contractor, and the defendant and others, which contract was subsequently assigned to plaintiff. This contract was offered in evidence, and is as follows:

"This agreement, made and entered into this 25th day of April, A. D. 1892, by and between J. G. Duffy, of the city and county of San Francisco, state of California, party of the first part, and certain owners of property, lots, and land fronting on Chestnut— $\frac{1}{2}$  street, between Jones and Leavenworth streets, in the city and county above mentioned, whose names are hereunto subscribed, each contracting severally, parties of the second part;

"Witnesseth, that the said party of the first part, for and in consideration of the covenants of the said parties of the second part, hereinafter expressed, promise, covenant, and agree to and with the said parties of the second part that he will furnish all the materials and perform the work of constructing, in a good and workmanlike manner, in front of the property here represented, and to the satisfaction of the superintendent of public streets of said city and county. To grade to official line and grade for the sum of five dollars (\$5) per front foot.

"And the said parties of the second part, in consideration of the premises, each for himself, or herself, and not for the others, promises, covenants, and agrees to and with the said party of the first part that he or she will pay to the said party of the first part, upon the com-

pletion of the work aforesaid, his or her *pro rata* share of the total cost of the above described work, together with the incidental expenses, according to the ratio that his or her frontage bears to the whole frontage here represented, and in accordance with the rule established by the street law.

"In witness whereof, the said parties to these presents have hereunto set their hands and seals the day and year aforesaid.

J. G. DUFFY, [L. S.]

"Contractor.

"No. feet fronting on each street:		Feet.	Inches.
Clara Finley per John Finley.....	137	6	
Johanna H. Wright per Selden S. Wright....	46	0	
Daniel Rogers and R. C. Bolton, Executors of the Last Will and Testament of James			
R. Bolton, deceased. ....	49	6	
David Fay . . . . .	80	0	
R. G. Welsh . . . . .	100	0"	

From the foregoing it will be observed that the only direct allusion to the street is in speaking of the "certain owners of property, lots, and land fronting on Chestnut  $\frac{1}{2}$  street," etc. The only obligation of the contractor is to furnish the material and perform the work of constructing in a good and workmanlike manner in front of the property represented, and to "grade to official line and grade" to the satisfaction of the superintendent of streets. What is to be graded can only be inferred. If it is the street and one-half of it, what half? The contract is silent on this question. Possibly, had the contract been set out in the complaint, with proper averments of the intention and object of the parties, it might upon proof have been so reformed as to be available as a basis for a recovery. As it stands, it is too uncertain and indefinite to entitle it to be admitted in evidence under the allegations of the complaint, and appellant's objection to its admission should have been sustained.

2. It is established by the evidence without contra-



diction that a portion of the work of grading the south half of the street was performed by the contractor, Duffy, before the assignment to plaintiff.

Defendant testifies that one-half of it was done by Duffy. Duffy himself testified that it was much less than half, and plaintiff testified that one-tenth part only was graded, yet his notice and claim of lien was for all the work of grading the south half of the street.

This question was by the pleadings made an issue in the case, and under the evidence there should have been a finding thereon. It was a material issue, for the reason that while Duffy could assign his contract and thereby entitle the plaintiff to a personal judgment for any amount due him, he could not assign his right to a lien as security for the payment of what might be due him.

A perfected lien may be assigned, or rather it passes with an assignment of the demand for which it stands as security. The mere right to take a lien in the present or future is not assignable. (*Mills v. La Verne Land Co.*, 97 Cal. 254; 33 Am. St. Rep. 168.)

If it be urged that the court below found that plaintiff performed all the work under the contract, the answer is that there is not a particle of evidence in support of such a finding, and the evidence is positive that he did not do it all. And as this finding is assailed, as well as the failure of the court to find the share or proportion of the grading performed by Duffy and the proportion by his assignee, the plaintiff, the error is not cured.

It is true that, when the court below came to pass upon defendant's application for a new trial, it denied the motion upon condition that plaintiff remit ten per cent of the amount of his recovery, and it is said by respondent that this deduction was on account of labor performed by the original contractor. The record is silent as to the cause of the remission, and, in the face of the evidence, which showed that a small portion of the work was never completed, it may, with equal propriety,

be inferred that the required remission was on the latter account.

3. At the trial defendant, after proof of its execution simultaneously with the contract, offered in evidence the following paper executed by Duffy, the contractor:

"SAN FRANCISCO, April 27, 1892.

"This is to certify that I have no claim on Mr. Fay for any work performed on Chestnut street by Mr. A. E. Buckman, myself, J. G. Duffy, or assigns, in doing the balance of grading on Chestnut street.

"J. G. DUFFY."

To the introduction of which plaintiff objected; the objection was sustained and the ruling is assigned as error.

We think that upon its face this document, which may be termed a release, was admissible.

It may have been executed because the street in front of defendant's premises had been graded by Buckman, the individual therein mentioned, and already paid for by defendant, or it may have been because such grading had been done, and that defendant was, as stated in the answer, only a nominal party to the contract to enable the parties in interest to secure a sufficient number or proportion of the landowners on the block to obtain a permit from the superintendent of streets to make the improvement. This, if done with the knowledge and consent of the other contractors, was in nowise a fraud upon them.

If it was a secret or side agreement between the contractor and defendant, made in fraud of the rights of the other contracting parties, that fact was open to investigation, and upon a full inquiry the court could have readily determined the question. The mere fact that the plaintiff was not aware of this release at the time he took an assignment of the contract is of no moment. He must be deemed to have taken such contract *cum onere*, subject only to the duty of defendant to notify him of any conditions not specified in the contract itself, such as its full execution, payment thereunder, etc.

4. The notice of lien as filed complied substantially with the requirements of the statute, and is deemed sufficient.

The judgment and order appealed from should be reversed and the cause remanded, with leave to plaintiff to amend his complaint if he shall be so advised.

BELCHER, C., and HAYNES, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are reversed and the cause remanded, with leave to plaintiff to amend his complaint if he shall be so advised.

McFARLAND, J., TEMPLE, J., HENSHAW, J.

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[Crim. No. 50. Department Two.—December 10, 1895.]

THE PEOPLE, RESPONDENT, v. CHARLES W. WARD,  
APPELLANT.

**CRIMINAL LAW—BRIBERY—SUFFICIENCY OF INDICTMENT.**—An indictment charging a defendant with willfully and feloniously giving a bribe to a member of a board of supervisors, with intent to corruptly influence him in a certain matter, but not containing any averment of any act or acts bringing the alleged conduct within the legal meaning of bribery, and not stating the particular circumstances of the offense charged, is insufficient, and a demurrer thereto should be sustained.

**ID.—AVERMENT OF BRIBERY—CONCLUSION OF LAW.**—A general averment in an indictment that the defendant bribed a certain person to do a certain thing is the averment of a legal conclusion only.

**ID.—FOLLOWING LANGUAGE OF STATUTE—EXCEPTION TO RULE—CIRCUMSTANCES CONSTITUTING OFFENSE.**—The general rule that an indictment is sufficient if it substantially follows the language of the statute prohibiting the offense charged does not apply to a case where particular circumstances of the offense are necessary to constitute a complete offense, but only applies when such statute defines or describes the acts which constitute the particular offense; and it is not sufficient to follow the general words of section 165 of the Penal Code, providing that "every person who gives or offers a bribe" to one of several officers named, etc., is punishable in a certain manner; but it is essential that the acts constituting the bribe, as defined in subdivision 6 of section 7 of the Penal Code, be specified with reasonable certainty, so as to enable the defendant to answer the specific charge described in section 7 as constituting the offense of bribery.

APPEAL from a judgment of the Superior Court of the County of San Joaquin. ANSEL SMITH, Judge.

The facts are stated in the opinion of the court.

*William M. Gibson*, and *J. G. Swinnerton*, for Appellant.

An indictment on a statute must contain all the elements named in the statute defining the offense. (Pen. Code, secs. 165, 167; *People v. Schmidt*, 63 Cal. 28; *People v. Turnbull*, 93 Cal. 630; *People v. Williams*, 35 Cal. 671; *People v. Carroll*, 80 Cal. 153; *People v. Hanselman*, 76 Cal. 460; 9 Am. St. Rep. 238; *People v. Ross*, 103 Cal. 425; *People v. McKenna*, 81 Cal. 159; *People v. Neil*, 91 Cal. 468.)

*W. F. Fitzgerald*, Attorney General, and *Charles H. Jackson*, Deputy Attorney General, for Respondent.

Following the language of section 165 of the Penal Code, in conjunction with the word "bribe," comprehends all the elements of the crime. (*People v. Rogers*, 81 Cal. 209; *People v. Forney*, 81 Cal. 118; *People v. Keeley*, 81 Cal. 210; *People v. Rozelle*, 78 Cal. 89; *People v. Fowler*, 88 Cal. 136; *People v. Russell*, 81 Cal. 616; *People v. Mahlman*, 82 Cal. 585; *People v. Savercool*, 81 Cal. 650; *People v. Naylor*, 82 Cal. 608; *People v. Tonielli*, 81 Cal. 275; *People v. Edson*, 68 Cal. 549; *People v. Markham*, 64 Cal. 157; 49 Am. Rep. 700.)

*W. B. Nutter*, District Attorney, and *Marion De Vries*, Assistant District Attorney, for Respondent, upon Petition for Rehearing.

Section 7 of subdivision 6 of the Penal Code prescribes only a rule of evidence. (*People v. Donaldson*, 70 Cal. 116.) Where the offense is prohibited in general terms in one section of the statute, and another distinct section defines the offense more particularly, it is sufficient to follow the general description in the language of the statute. (*State v. Casey*, 45 Me. 436; *Wat-*

*son v. State*, 39 Ohio St. 126; *People v. Shaber*, 32 Cal. 36; *People v. Fuqua*, 58 Cal. 245; *People v. Savercool*, 81 Cal. 650; *People v. Congleton*, 44 Cal. 92-94; *People v. King*, 27 Cal. 511; 87 Am. Dec. 95; *People v. Cronin*, 34 Cal. 201; *United States v. Simmons*, 96 U. S. 364.)

MCFARLAND, J.—The appellant was convicted of the “crime of giving a bribe,” and appeals from the judgment and from an order denying a motion for a new trial.

The appellant demurred to the indictment upon the grounds that it does not substantially comply with the requirements of sections 950 and 952 of the Penal Code. His demurrer was overruled, and we think that the court erred in overruling it.

The indictment charges that the appellant did willfully, feloniously, etc., “give a bribe” to a certain member of the board of supervisors, with intent to corruptly influence him in a certain matter; but it does not contain any averment of any act of appellant which brings his alleged conduct within the legal meaning of bribery. The indictment would be the same if it had merely charged, generally, that defendant “bribed” a certain person to do a certain thing. This would be the averment of a legal conclusion only, and as bad as a mere general averment that a defendant “murdered” somebody or “stole” something.

Section 950 of the Penal Code provides that the indictment shall contain “a statement of *the acts* constituting the offense in ordinary and concise language”; and section 952 provides that “it must be direct and certain as it regards, . . . 3. The particular circumstances of the offense charged when they are necessary to constitute a complete offense.”

Subdivision 6 of section 7 of the Penal Code provides as follows: “The word ‘bribe’ signifies anything of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given, or accepted, with a corrupt intent to influence, unlawfully,

the person to whom it is given, in his action, vote, or opinion, in any public or official capacity"; and section 165 provides that "every person who gives or offers a bribe" to one of several officers named, with intent, etc., is punishable in a certain manner. And counsel for respondents contend that the indictment is good, because, as they say, "it follows the language of the statute."

This court has said several times, in general terms, that an indictment is sufficient if it substantially follows the language of the statute. This is true generally, but not universally. It is not true of a case where "the particular circumstances . . . are necessary to constitute a complete offense." The rule especially applies to purely statutory offenses. But what does the rule mean? It means simply this: that when the statute defines or describes the acts which shall constitute a particular offense, it is sufficient in an indictment to describe those acts in the language employed in the statute, applying them, of course, concretely to the person charged. One of the earliest cases on the subject is *People v. Parsons*, 6 Cal. 487. In that case the indictment was for perjury, and left out the word "feloniously"; and it was held good, because in the statutory definition of the crime of perjury the word "feloniously" was not used. In its opinion the court said: "The indictment in this cause charged the offense in the words of the statute *defining it*; . . . time, place, and *circumstance* are stated with certainty, and every information is given to the defendant which is *necessary to enable him to answer the charge*." There the words of the statute defining the offense were used in the indictment. *People v. Shaber*, 32 Cal. 36, is another early case. There the court, in sustaining the indictment, said: "The indictment charges the offense in the very terms used *in defining it* in the fifty-eighth section of the Crimes Act." And even in that case Sanderson, J., dissented, saying that it was a familiar principle in all pleadings that "the facts are to be stated to the exclusion of conclusions of

law to be drawn therefrom." And in the cases following these earlier ones it will be found that the rule declared on the subject is simply that an indictment is good if it alleges all the facts or acts necessary to constitute the particular offense charged in the language used by the legislature in defining it. For instance, the meaning of the rule is fully stated by Paterson, J., in *People v. Fowler*, 88 Cal. 138, as follows: "The information follows the language of the statute, and is sufficient. It alleges *all the acts and facts which the legislature has said shall constitute the offense.*"

The only two cases cited where bribery was involved are *People v. Edson*, 68 Cal. 549, and *People v. Markham*, 64 Cal. 157; 49 Am. Rep. 700. In the Edson case the language of the indictment is not given, but the opinion refers to the Markham case as authority; and in the Markham case the indictment charged that the defendant, at a certain time and place, being a police officer, etc., did "agree to receive a bribe, to wit, *fifteen standard dollars, lawful coin of the United States of America.*"

Therefore, assuming the general rule, as above explained, to be that it is sufficient to allege an offense in the language of the statute, the offense charged in the case at bar is not alleged in the language of the statute in the indictment under review. It does not allege "the acts and facts which the legislature has said shall constitute the offense." The material acts or facts constituting the legislative definition of bribery are the giving to a public officer something "of value or advantage, present or prospective," or giving "any promise" or entering into any "undertaking" to give something of value or advantage. There is no averment that appellant gave the supervisor anything of value, or of advantage, or that he gave anything at all; or that the thing was of present or prospective advantage; or that it was a promise to do something, or an undertaking of some kind which was, or would be, beneficial to the supervisor. As said by counsel for appellant: "The defendant is not informed whether the people will prove that

he gave money, a promise of employment, a promise of political influence, a contract, instruction, entertainment, or any other of the many things which might constitute a bribe." It is true that the rules of the common law, with respect to criminal pleading, have been greatly relaxed in this state by legislation and judicial decision, and many of the formalities and particularities formerly deemed necessary are not now required; but the fundamental rule that an indictment must state with reasonable certainty what the defendant is charged with, so as "to enable him to answer the charge," has not been abrogated either by legislature or court. (*People v. Lee*, 107 Cal. 477.) An indictment for bribery should aver that the defendant gave something of value or advantage, present or prospective, or some promise or undertaking, or did some act, described by the statute as constituting the offense. A mere use of the language of section 165, which prescribes the punishment, is not charging the offense "in the words of the statute defining it."

The judgment and order appealed from are reversed and the cause is remanded, with instructions to sustain the demurrer to the indictment.

TEMPLE, J., and HENSHAW, J., concurred.

Hearing in Bank denied.

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[No. 15848. In Bank.—December 10, 1895.]

W. B. BANCROFT, APPELLANT, v. H. H. BANCROFT,  
RESPONDENT.

CONTRACTS—TRANSFER OF STOCK—UNDUE INFLUENCE—EXCLUSIVE REMEDY—RESCISSION—DAMAGES NOT RECOVERABLE.—Where a plaintiff has been led solely through the undue influence of the defendant to transfer stock in a corporation to the defendant for an inadequate consideration, the exclusive remedy in such a case is a prompt rescission of the contract, or an offer to rescind it, so as to put the other party in *statu quo*; and if he fails to rescind promptly, he thereby affirms the contract, and cannot maintain an action for damages upon the ground of undue influence in procuring the transfer.



**ID.—DISTINCTION BETWEEN FRAUD AND UNDUE INFLUENCE—REMEDY.—**

Where a contract was induced by fraud, the injured party may affirm the contract and recover damages in an action for deceit according to the terms upon which he was led to believe that he was contracting; but where the terms of the contract are perfectly understood, but assented to only because of the exercise of duress, menace, or undue influence, an affirmation being necessarily of the terms of the contract as they were understood when it was made, if those terms are fully complied with, there is nothing due upon the contract, and there can be no cause of action for damages.

**ID.—EFFECT OF UNDUE INFLUENCE—TRANSFER NOT VOID, BUT VOIDABLE.**

A contract of transfer is not rendered void by undue influence, but is only voidable upon restoration of the consideration paid at the option of the party aggrieved; and by failing to exercise the option to rescind it within a reasonable time, the contract is affirmed.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. **J. M. SEAWELL**, Judge.

The facts are stated in the opinion of the court.

*Mastick, Belcher & Mastick*, for Appellant.

Wherever there is an obligation arising from operation of law, and a breach of that obligation, the party injured may, by action, recover the amount which will compensate him for all the detriment proximately caused by the breach, whether the law gives him other remedies or not. (Civ. Code, secs. 1427, 1428, 1708, 3281, 3282, 3333; *Wood v. Franks*, 56 Cal. 217.) Where a contract has been procured by fraud, the injured party may, if he so elect, affirm the contract and sue for damages for the tort. (*Sheldon v. Steamship Uncle Sam*, 18 Cal. 534; 79 Am. Dec. 193; *Gifford v. Carvill*, 29 Cal. 593; *Ahrens v. Adler*, 33 Cal. 608; *Robarts v. Haley*, 65 Cal. 402; *Loaiza v. Superior Court*, 85 Cal. 30; 20 Am. St. Rep. 197; Cooley on Torts, 2d ed., 506; Hilliard on Torts, 4th ed., 74; Bigelow on Fraud, 6.)

*E. J. McCutchen*, for Respondent.

The plaintiff was obliged to rescind the contract within a reasonable time, before he could maintain this action. (Civ. Code, sec. 1689, 1691; *Burkle v. Levy*, 70

Cal. 250; *Bailey v. Fox*, 78 Cal. 389.) An action for damages cannot be maintained for obtaining property by means of undue influence. (*Le Caux v. Eden*, 2 Doug. 594.)

MCFARLAND, J.—A demurrer to the amended complaint was sustained, and, plaintiff declining to further amend, judgment was rendered for defendant, from which plaintiff appeals. The complaint is substantially as follows: Defendant is the uncle of plaintiff, and ever since the latter's boyhood plaintiff was under the control and direction of defendant, and in his employ, and a part of the time resided with him. Defendant was accustomed in a great measure to guide and direct plaintiff's actions in business and other matters; was tyrannical and overbearing, and impatient of opposition; and thus had and retained great influence over plaintiff, who was accustomed to rely upon and be guided by defendant in matters of business. Defendant owned much more than a majority of the stock of a certain corporation called the Bancroft Company, and entirely controlled and managed its affairs. Defendant was the president of said corporation, and plaintiff was employed as the manager of its business. In September, 1887, plaintiff became the owner of thirteen hundred and forty-five shares of the stock of said corporation, and continued to own the same until the thirteenth day of February, 1891. In November, 1890, plaintiff borrowed three thousand five hundred dollars from the People's Home Savings Bank, and, as security therefor, pledged to said bank said thirteen hundred and forty-five shares of stock. On February 12, 1891, defendant demanded of plaintiff that plaintiff should transfer and deliver to defendant the said thirteen hundred and forty-five shares of stock, and all his interest in the assets and property of said corporation for the sum of five thousand dollars, and then and there "informed plaintiff that unless he should forthwith transfer to him [defendant] the said stock and property on the terms aforesaid,

he [defendant] would inform the said bank that plaintiff was not the owner of said stock, or any part thereof, and that plaintiff had pledged said stock without right or authority." He also said that he (defendant) would not pay more than two thousand dollars of said indebtedness of plaintiff to said bank, and would levy assessments on the stock of said corporation to the extent of closing out its business. "Thereupon plaintiff, solely through the influence possessed over him by defendant, and his habitual fear of defendant, and terrified by the threats aforesaid, and fully believing that defendant would carry said threats into execution, and would make to said bank and to others the statements so threatened, and that by reason of such statements plaintiff's character and reputation would be blasted and destroyed in the community in which he was residing and doing business, on the thirteenth day of February, 1891, acceded to said demand." Thereupon defendant directed plaintiff to deliver said stock to the said Bancroft Company, and to give to said company a bill of sale of all his interest in the property of said corporation, which plaintiff did on said day, "solely for the reasons aforesaid." The said company paid said indebtedness to said bank, and paid the balance of the five thousand dollars to plaintiff. It is averred that "plaintiff's consent to so transfer and deliver said stock to said corporation and to execute the bill of sale aforesaid was not freely given, but was obtained solely by the means aforesaid, and in consequence of the menace and the undue influence so exercised by defendant as aforesaid." Also "that, as plaintiff is informed and believes, the value of said thirteen hundred and forty-five shares of stock on the said thirteenth day of February, 1891, was the sum of fifty thousand dollars, as was then well known to defendant, and plaintiff has been damaged by the wrongful acts of defendant as aforesaid in the sum of forty-five thousand dollars." It is also averred, upon information and belief, that after said transaction defendant so mismanaged the affairs of said corporation

that "the said shares of stock became, and were at the commencement of this action, greatly depreciated, and of little or no value." The prayer is for "judgment against defendant for the sum of forty-five thousand dollars and for costs of suit." It does not appear when the action was commenced, but the present complaint was filed November 6, 1893, nineteen months after the alleged cause of action accrued. No offer to rescind was ever made by appellant.

Waiving all questions as to the sufficiency of the complaint in other respects, we think that the learned judge of the court below was right in holding that it does not show any ground for avoiding the sale through want of the free consent of the appellant, unless that ground be "undue influence"; and that in such a case the remedy is rescission. It is admitted that no case can be found in all the books where a general action for damages has been maintained upon the ground of undue influence in procuring a sale or other contract. In *Le Caux v. Eden*, 2 Doug. 594, the question was whether an action at common law could be maintained for an imprisonment on a capture at sea *as prize*, and Buller, justice, said: "There is no case in which it has ever been holden that such an action would lie; and if it could be maintained, there are, in every way, such frequent opportunities for it that it must have happened in every day's practice, or some instances at least must have been in the memory of those who have had long experience in 'Westminster Hall'; but there is not the smallest trace of such a determination, or even dictum, in any court in England. A universal silence in Westminster Hall on a subject which so frequently gives occasion for litigation is a strong argument to prove that no such action can be sustained." That case was decided in 1781, and dealt with litigation which could arise only out of the exceptional condition of war. How much stronger, therefore, is the authority of more than another hundred years of "silence" in the courts of both England and America, upon a subject which, both in

peace and war, "so frequently gives occasion for litigation." But, in addition to this negative authority, it is clear upon principle that this present action should not be maintained, because to maintain it would be to violate the wholesome and fundamental doctrine that in such a case the party claiming to be aggrieved must promptly rescind, or offer to rescind, so as to put the other party *in statu quo*. He cannot wait to speculate on future contingencies. The sale from appellant to respondent was not void; it was only voidable upon restoration of the consideration paid. It has been held, it is true, that an action to recover damages for a deceit or fraud will lie; but that is on the ground that the party defrauded had no knowledge of the facts constituting the fraud. Even in that case great wrong is sometimes done when rescission is not required; but the rule should not be extended to other cases to which it has not been applied. The provisions of our Civil Code, all construed together, do not change the law on the subject. If it be said that a case could be imagined where the facts constituting the alleged undue influence *were not known* to the complaining party, and that there rescission should not be required, it is sufficient to reply that the case at bar is not such case.

The judgment is affirmed.

BEATTY, C. J., concurring.—"A contract which is not free is nevertheless not absolutely void, but may be rescinded by the parties in the manner prescribed by the chapter on rescission." (Civ. Code, sec. 1566.)

The contract by which plaintiff parted with his stock was not void, but merely voidable at his option. He had the choice to affirm it or to rescind it, and it appears that he affirmed it by failing to rescind promptly when freed from the undue influence by which his consent was obtained. (Civ. Code, sec. 1691.)

Having affirmed the contract, can he recover damages? He claims that he is entitled to recover the full value of the stock upon the same grounds that sustain an action

for deceit in case of a contract induced by fraud. But the analogy does not hold. When a contract induced by fraud is affirmed by the injured party, he affirms it (as he has the right to do) according to the terms upon which he was led to believe he was contracting; and what he recovers in an action for deceit is the value of that which he believed he was getting, and the other party knew he expected to get, but which he did not in fact get, or a value which he did not intend to part with, and the other party knew he did not intend to part with. In other words, he affirms the contract as he was induced by the other party to understand it, and he recovers what, according to such understanding, he ought to have or ought not to have parted with. In case of a contract the terms of which are perfectly understood, but are assented to only because of the exercise of duress, menace, or undue influence, the right of the injured party to rescind or affirm exists the same as in cases of fraud. But, as in cases of fraud, an affirmation is necessarily of the terms of the contract as they were understood when the consent was given; and if those terms have been fully complied with, as in this case, there is nothing due upon the contract and no cause of action.

If the plaintiff had promptly given notice of his repudiation of the contract, and offered to pay back the five thousand dollars upon condition that the stock was returned, or even without such offer if the defendant had parted with the stock or its value had depreciated, he might have maintained an action for the stock or its value based upon the rescission, but he cannot recover upon an affirmation of the contract what he never expected to get under the contract.

TEMPLE, J., and HENSHAW, J., concurred.

GAROUTTE, J., dissenting.—I dissent. It is claimed that the conduct of defendant practiced toward plaintiff amounts in law to duress, menace, and undue influence. And, as to whether or not these acts are sufficient in law

to constitute menace or duress, I will not discuss; for in sustaining the demurrer to the complaint, the trial court conceded a case of undue influence to have been stated, and respondent, by his argument, substantially concurs in such views of the trial court. This being true, the contract is no better and occupies no different position than though menace and duress also entered as elements in its creation.

It will be observed that the present action is not one for a rescission of the contract, but is an action at law for compensatory damages; and the trial court held against the sufficiency of the complaint upon the broad ground that an action at law for damages will not lie in a case like the one at bar, but that relief can alone be obtained by rescission in a court of equity; and the soundness of this ruling is the point involved. It may be said that no authority by either side has been cited in point, for or against the proposition of law under consideration, and my own research fails to recall a single precedent. Respondent, as a last resort, is forced to rely upon the case of *Le Caux v. Eden*, 2 Doug. 602, where Justice Buller made some very general observations, which are cited in the main opinion. But, in view of the fact that for such wrongs as these a remedy by rescission has always been recognized, and that it would in almost every case be a much more adequate remedy than an action for damages, as the practicers of these frauds are generally financially irresponsible, we think in this case but little weight should be attached to the very general principle declared by the learned English judge. The necessity and advisability of bringing this character of action may seldom arise. But, beyond this, the only question here is the applicability of a certain principle of law to a given state of facts, and, even if the question has arisen for the first time, it is as much the duty of the court to now determine it upon principle and reason as if it had come before the court for the first determination a hundred years ago. Precedents go down before principles any way. Again,

there has been a time when there was no precedent for the decision of any case. New precedents are being made at the present, and will continue to be made in the future; and the day is long distant when a precedent may be found for every case arising within the vast domain of the law.

It is not disputed that an action for damages upon a contract secured by fraud will be sustained, and that a resort to a court of equity for relief is not necessary. Such doctrine is elementary, and cases everywhere and without number support it. But it is insisted that the rule of law is different as to menace, duress, and undue influence. In substance, the contention is, that if A deceives me by falsehood, and thereby secures from me a contract to my great loss, I may recover from him in damages, for it is fraud. But if B, with pistol at my head, threatens to kill me, and thereby procures a similar contract, I may not recover from him in damages, because, forsooth, his acts do not constitute fraud, but menace. Or, if C procures a similar contract from me by taking a grossly oppressive and unfair advantage of my necessities and distress, no action at law for damages will lie against him, for he has not practiced fraud, but has used undue influence. I am wholly unable to comprehend why a different rule of law is applicable to the two classes of cases furnished by the above illustrations. Certainly, the fraud of A is no more iniquitous than the menace of B, or the undue influence of C; and I think it illy becomes either one of these wrongdoers to say: "You have no choice of actions. Your only remedy is rescission. I will not pay the damage you have suffered from my unlawful acts, but demand that I be placed in my original position." I think that neither A, B, nor C should be allowed to name the action which may be brought against him, and, if the party injured is able to secure adequate relief by damages, the road to that remedy should be open to him. Let us take the case of valuable securities resting upon a fluctuating market, and before the aggrieved party could



get into court for relief by rescission, using the diligence demanded by the law, the securities become valueless. Is there no remedy by damages? If not, the wrongdoer is a lucky rogue, for in the interim he may have realized upon these securities, and still be ready to return the worthless paper to the owner upon demand or at the end of litigation. It would seem that such result should not be allowed under the guise of law, for it is gross injustice and a premium upon fraud.

Corporation stock often assumes great value as the time approaches for the election of a new directorate. Upon the day after such election its value may be merely nominal. At the very moment when it is of great value may the owner be deprived of it by menace or undue influence, and his only redress for the wrong be a judgment for the return of the stock at a time when it is utterly worthless? Such a judgment furnishes no redress, for it gives no relief. If this illustration portrays a case of *damnum absque injuria* the law is not what it should be. To my mind the law contains no such glaring defect.

Taking a broad view of the question, we are justified in saying that this contract was procured through fraud. What is undue influence, menace, or duress but fraud? Fraud is certainly a broader word than deceit; by deceit fraud is accomplished, but it is likewise accomplished by many other practices. Mr. Bigelow, in his work upon Fraud, page 6, declares it may be an infringement of the legal rights of another by circumvention and without deceit. Mr. Hilliard declares (Hilliard on Torts, 3d ed., 138): "Fraud properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence reposed, and are injurious to another, or by which an undue, unconscientious advantage is taken of another." And Cooley, in his work upon Torts, says (Cooley on Torts, \*506): "Duress is a species of fraud in which compulsion in some form takes the place of deception in accomplishing the injury." It will thus be seen that deceit is but

one of many kinds of fraud, and, while actions for damages arising from contracts procured by deceit alone are of common occurrence, we find no principle declared in those cases which limits the remedy by reason of some inherent quality found in the definition of the word "deceit"; but, rather, deceit is declared to be a fraud, and compensation in the nature of damages for fraud is but justice in its simplest form.

Let us assume that contracts procured through menace, duress, or undue influence are made through agencies which may not technically come within the definition of fraud. What matters it? All the parties stand upon the same plane. The practices in either case are equally forbidden by the law. They are all morally bad. They are violative of the same rights of the party injured. They are violative of the same duties incumbent upon the party doing the wrong. Again, the contract made is no better or worse in the one case than in the other; and I know of no reason why the remedies should not be as many and as full and complete in the one case as in the other. The wrongdoer accomplishes the same wrong in each, and does it with the same bad intent; and, as to the victim's remedy, it would seem to be wholly immaterial whether the means to the end be fraud, undue influence, or duress. The cases upon principle are analogous, and the law applicable to the one state of facts must of necessity control the other.

It is claimed that in the case of fraud the party injured does not know the facts, while the contrary conditions exist in a case of duress, menace, or undue influence. Conceding the claim, the principle involved is not changed thereby. In one case the act is induced by a want of knowledge, and in the other by overpowering influences. There is no more consent in the one than in the other, and there is the same wrongful interference with the party's rights in both. Neither does the principle of acquiescence in the contract occupy any different position in the two cases. In a case of fraud nothing is done and no remedy invoked until the

fraud is discovered, and, when discovered, the party seeking relief is in exactly the same position, as to the contract and the facts leading up to it, as though it had been obtained by undue influence or duress. When the fraud is discovered the party is called upon to act, and may either elect to confirm the contract and sue for damages at law for the detriment, or go into a court of equity for relief upon the rescission of the contract; and upon analogous reason a like choice of remedies must be open to him in a case similar to the one at bar.

The Civil Code of this state, in speaking of obligations imposed by law, declares (section 1708): "Every person is bound without contract to abstain from injuring the person or property of another, or infringing upon any of his rights." Section 1428 declares that obligations may arise by operation of law, and further provides: "An obligation arising from operation of law may be enforced in the manner provided by law, or by civil action or proceeding." Section 3281 declares: "Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money which is called damages." These principles would seem to be but reiterations of elementary law, but, if not, and they take advanced ground, then beyond question they blaze a path through virgin forests plainly leading to a court of law for relief. By unlawful means defendant induced plaintiff to part with his property for an inadequate consideration. This was a violation of an obligation imposed upon him by law, for it was an infringement upon plaintiff's rights, and he was entitled to damages in an amount which would compensate him for the detriment directly caused thereby. It is contended by defendant that cases involving the principle here discussed form exceptions to the law as declared in section 3281, *supra*. The section states no exception, but, upon the contrary, is as broad as language can make it. Neither do I find any exception stated elsewhere in the code. While it is true the code provides

for "specific and preventive relief," still there is nothing to indicate that the remedies there declared should be exclusive. Again, the contention, if sound, would likewise deny any remedy for damages in a case of a contract procured by fraud or deceit, and this we have seen is not the law of this state or any other state. In the case of *Wood v. Franks*, 56 Cal. 217, the principle of law to which we hold is fairly illustrated and fully supported. In that case, after quoting the sections of the Civil Code, to which reference has been made, the court said: "Thus it will be seen that wherever there is an obligation arising from operation of law, and a breach of that obligation, the party injured may, by action, recover the amount which will compensate him for all the detriment proximately caused by the breach."

To support the conclusion I have arrived at in this case, I do not hold that in all cases of contract procured by "undue influence" the remedy of damages is open. Rescission is the only remedy in a case of "mistake," for no fraud has been practiced; there has been no wrongdoing, the transaction has been innocent, and the parties must be, and should be, satisfied to return to their original position. Such should also be the rule in many cases of undue influence, as where the relations of the contracting parties were such that the law, regardless of any question of bad and wicked intention, would declare the contract void. But the rule here declared is limited to those cases possessing the characteristics of torts, where an act has been done intentionally and knowingly for the very purpose of securing the undue advantage which results. There must be bad faith and a sense of wrongdoing; and such was certainly this case, as shown by the allegations of the complaint.

HARRISON, J., concurred in the foregoing opinion of Mr. Justice Garoutte.

Mr. Justice VAN FLEET, being disqualified, did not participate in the decision of this cause.

Rehearing denied.

[Sac. No. 34. In Bank.—December 10, 1895.]

**ESTATE OF OZIAS WALKER, DECEASED. LYDIA A. LANE, RESPONDENT, v. OLIVER M. WALKER, APPELLANT.**

**WILL—INFORMAL EXECUTION—MISTAKE IN SIGNATURE OF WITNESS—REVOCATION OF PROBATE.**—Where a will, written by an attorney at law of the testator, was executed in the presence of the attorney and another person, who were requested by the testator to attest its execution as witnesses, and the attorney, in signing his name as a witness at the end of the will, inadvertently employed his own initials in connection with the testator's surname, and did not attach his own name to the will as a witness, the will is insufficiently executed, and the court may properly revoke its probate upon petition of an heir of the testator.

**ID.—LEGISLATIVE AUTHORITY—COMPLIANCE WITH LAW ESSENTIAL.**—The right to make a testamentary disposition of property is not an inherent right, nor a right granted by the constitution, but it rests wholly upon the legislative will, and is derived entirely from the statutes; and in conferring that right the legislature has seen fit to prescribe certain requirements in reference to the execution and authentication of the instrument, a compliance with which is necessary to the exercise of the right.

**ID.—CONSTRUCTION OF STATUTE OF WILLS—INTENTION OF TESTATOR—LEGISLATIVE INTENT.**—The rule governing the interpretation of wills, which recognizes and endeavors to carry out the intention of the testator cannot be invoked in the construction of the statute regulating their execution, in respect to which the courts do not consider the intention of the testator, but only that of the legislature.

**ID.—PROVINCE OF COURT—SUPREMACY OF LEGISLATIVE MANDATES—TECHNICALITIES.**—It is not within the province of the courts to say that the statutory requirements in respect to the execution and authentication of wills, or any of them, are mere formalities, which may be waived without impairing the *status* of the instrument, or that a mode of execution or authentication, other than that prescribed by law, subverts the same purpose; but the legislative mandates are supreme, and although a failure to comply with them is of a nature purely technical, the court cannot dispense with technicalities imposed by the law-making power upon the maker of a will.

**ID.—PECULIARITIES OF CALIFORNIA STATUTE—ENGLISH AUTHORITIES INAPPLICABLE.**—The California statute differs from the English statute, in requiring a subscription of the name of the witness at the end of the will, and the English decisions as to what constitutes a signing under the English statute are inapplicable; and no other mode of subscription than that required by the California statute will answer the purpose in this state.

**ID.—PROVING OF WILL—COMPLIANCE WITH LAW—WISHES OF TESTATOR.** In proving a will, the sole consideration before the court is whether or not the legislative mandates have been complied with, and the wishes of the testator cannot be considered.

APPEAL from orders of the Superior Court of Butte County revoking the probate of a will and denying a motion for a new trial. JOHN C. GRAY, Judge.

The facts are stated in the opinion of the court.

C. G. Warren, and F. C. Lusk, for Appellant.

The signing of the witness was sufficient, as he intended the name written to be his signature. The initials of the witness amount to a sufficient subscription if placed for their signature. A witness need not sign his own name, if the name actually subscribed be intended to represent his name. (*Adams v. Chaplin*, 1 Hill Eq. 265; 1 Jarman on Wills, 5th Am. ed., 213; 4th Am. ed., 73, and American note; *Goods of Christian*, 2 Rob. Ecc. 110.) A witness may sign by a fictitious name. (*Goods of Maddock*, 3 L. R. Pro. & D. 169; 1 Redfield on Wills, 229, c. VI, sec. 4; 1 Wörner's American Law of Administration, 63, 71; *Goods of Redding*, 2 Rob. Ecc. 339; *Goods of Eynon*, 3 L. R. Pro. & D. 92; *Goods of Ashmore*, 8 Curt. Ecc. 756; *Pryor v. Pryor*, 29 L. J. Prob. 114; *Goods of Clarke*, 4 Jur., N. S., 243; *Long v. Zook*, 13 Pa. St. 400; *Goods of Oliver*, 2 Spinks, 57; *Goods of Sperling*, 3 Swab. & T. 272; 33 L. J. Prob. 25; *Potts v. Felton*, 70 Ind. 166; *Lord v. Lord*, 58 N. H. 7; 42 Am. Rep. 565.) The principal thing is the intent to sign. (*Knox's Estate*, 181 Pa. St. 220; 17 Am. St. Rep. 798; *Plate's Estate*, 148 Pa. St. 55; 33 Am. St. Rep. 805; Browne on Statute of Frauds, sec. 362; *Brown v. Butcher's etc. Bank*, 6 Hill, 443; 41 Am. Dec. 755.) Testamentary dispositions of property are favored; hence it has always been ruled that a substantial compliance with the statute, as to attestation and execution, is sufficient. (*In re Beckett*, 103 N. Y. 167; *In re Hunt*, 110 N. Y. 278; *In re Voorhis*, 125 N. Y. 765; *In re Guilfoyle*, 96 Cal. 598.) Nothing more is required of the witness in signing than the testator. (Civ. Code, sec. 1276. See the word "subscribe" in Bouvier's, Webster's, Worcester's, and Century Dictionaries.)

. *William H. Schooler, and Reardon & White, for Respondent.*

The four things required by section 1276 of the Code of Civil Procedure to be done must concur in order to constitute a valid will. (*Estate of Martin*, 58 Cal. 532; *Estate of Billings*, 64 Cal. 427; *Chaffee v. Baptist etc. Convention*, 10 Paige, 85; 40 Am. Dec. 228; *Remsen v. Brinckerhoff*, 26 Wend. 325; 37 Am. Dec. 253.) The terms "subscribe an instrument" and "sign the party's or witness' name thereto" are not synonymous. (Code Civ. Proc., secs. 446, 1276, 1278, 1387.) The statute fixes an inflexible rule by which to determine the proper execution of all testamentary instruments. (*Estate of O'Neil*, 91 N. Y. 521; *Grabill v. Barr*, 5 Pa. St. 441; 47 Am. Dec. 418; *Estate of Martin, supra.*) If the witness intended the name written to represent his name, it was equivalent only to a mark, and insufficient, because not attested as required by section 17 of the Code of Civil Procedure, and section 14 of the Civil Code. (*Goods of Redding*, 2 Rob. Ecc. 3.) In passing upon the question of whether a will is properly executed or not, the courts do not consider the intention of the testator, but that of the legislature. (*Matter of O'Neil, supra; Estate of Martin, supra; Estate of Billings, supra; Estate of Rand*, 61 Cal. 474; 44 Am. Rep. 555; *Chaffee v. Baptist etc. Convention, supra.*)

HENSHAW, J.—Appeals from the judgment revoking the probate of a will, and from the order denying a motion for a new trial.

The facts disclosed by the evidence without conflict are as follows: The will of Ozias Walker, deceased, was written by C. G. Warren, the attorney at law of the testator, and was executed in the presence of H. C. White and C. G. Warren, who were requested by the testator to attest, as witnesses, its execution. The requirements of the statute were complied with in all respects, saving that the witness C. G. Warren, in signing his name as a witness at the end of the will, inadvertently wrote the

name C. G. Walker, thus employing his own initials but the testator's surname.

Upon this showing the court revoked the probate of the instrument, and the propriety of its action in so doing is the sole question presented upon this appeal.

At the outset of this consideration it is proper to say that the right to make testamentary disposition of property is not an inherent right or a right of citizenship, nor is it even a right granted by the constitution. It rests wholly upon the legislative will, and is derived entirely from the statutes. In conferring that right the legislature has seen fit to prescribe certain exactions and requirements looking to the execution and authentication of the instrument, and a compliance with these requirements becomes necessary to its exercise. As has been said (*In re O'Neil*, 91 N. Y. 520, 521): "While the primary rule governing the interpretation of wills when admitted to probate recognizes and endeavors to carry out the intention of the testator, that rule cannot be invoked in the construction of the statute regulating their execution. In the latter case courts do not consider the intention of the testator, but that of the legislature."

As a prerequisite to the exercise of the testamentary right in this state, the legislature has prescribed for the execution and authentication of wills such as this the following requirements: 1. It must be subscribed at the end thereof by the testator himself, or some person in his presence, and by his direction must subscribe his name thereto; 2. The subscription must be made in the presence of the attesting witnesses, or be acknowledged by the testator to them to have been made by him or by his authority; 3. The testator must, at the time of subscribing or acknowledging the same, declare to the attesting witnesses that the instrument is his will; and 4. There must be two attesting witnesses, each of whom must sign his name as a witness at the end of the will, at the testator's request and in his presence. (Civ. Code, sec. 1276.)

It is not for courts to say that these requirements, or



any of them, are mere formalities which may be waived without impairing the *status* of the instrument. It is not for courts to say that a mode of execution or authentication, other than that prescribed by law, subserves the same purpose and is equally efficient to validate the instrument. The legislative mandates are supreme, and there is no right to make testamentary disposition except upon compliance with those mandates.

It may be freely conceded that the question under consideration is of a nature purely technical, but it is to be remembered that the whole subject matter of the execution and authentication of wills is technical and nothing else; and it must not be forgotten that the technicalities are those which the law-making power has the right to impose and has imposed upon the maker of a will.

It will be noted in the section of the code above quoted that the duty enjoined upon the testator is to subscribe the will, while that imposed upon the attesting witnesses is that each must sign *his name as a witness*. The difference is neither immaterial nor accidental. A testator may be illiterate, or he may by reason of paralysis, or other disabling cause, be incapacitated from signing his name, and the law has wisely and liberally provided for the due execution of a will by one so situated. It has required of him that he shall subscribe, and, while the word unquestionably has for one of its significations the signing of a name, it is a verb of comprehensive meaning. Any form or kind of underwriting is a subscription, and generally it has been held that any mark or writing by the testator meant by him to be his name, or to take the place of his signature, or to serve for his identification, will answer the requirements of a statute which calls merely for subscription or signing.

The same liberality of construction and interpretation has been put by the courts upon statutes which require the witnesses merely to subscribe or to sign.

There are thus numerous cases under such statutes which hold, in effect, that any signing by which alone or by which, aided by parol evidence, the identity of the subscriber may be ascertained, substantially complies with the statute.

The case of the appellant upon this proposition cannot be more strongly stated than in the following extracts from the learned work of Mr. Jarman, discussing the Victorian Wills Act:

"Examining the requirements common to the statute of frauds and the Wills Act in their order, the next condition prescribed for the validity of a will is that it should be signed, which suggests the inquiry, What amounts to a 'signing' by the testator? It has been decided that a mark is sufficient, and that notwithstanding the testator is able to write, and though his name does not appear on the face of the will. A mark being sufficient, of course the initials of the testator's name would also suffice. And it would be immaterial that he signed by a wrong or assumed name (since that name would be taken as a mark), or that against the mark was written a wrong name." (1 Jarman on Wills, 6th ed., \*79.)

"The next statutory requisition, which is common to the old and the present law, is that the will be 'attested and subscribed' by the witnesses. A mark has been decided to be a sufficient subscription. . . . The initials of the witnesses also amount to a sufficient subscription, if placed for their signature as attesting the execution. . . . A witness need not sign his own name if the name actually subscribed be intended to represent his name; or a description (without any name) is sufficient if intended to identify him as a witness. . . . In fact, there seems to be no distinction in these respects between the word 'sign' and 'subscribe'; any act, therefore, which, as before noticed, would be a good signature by a testator, would be a good signature by a witness." (1 Jarman on Wills, 6th ed., \*85, \*86.)

An examination of the cases bearing upon the interpretation of the English statute shows that the text of the learned author is fully supported.

The reasoning by which the conclusions are reached may be thus summarized:

To *subscribe* is to attest or give consent or evidence knowledge by underwriting, usually (but not necessarily) the name of the subscriber. But the place of the writing is immaterial, since a still more general meaning of the word "subscribe" is to attest by writing, in which definition the locality is wholly disregarded. This is the reasoning of the leading English case of *Roberts v. Phillips*, 4 El. & B. 450.

To *sign*, in the primary sense of the word, is to make any mark. To sign an instrument or document is to make any mark upon it in token of knowledge, approval, acceptance, or obligation. The *signature* is the sign thus made. And while, by long usage and custom, signature has come generally to mean the name of a person written by himself, and thus to be nearly an exact synonym of *autograph*, that signification is derivative, and is not inherent in the word itself any more than it is in *autograph*, which strictly conveys no more than the idea of a specimen of an individual's writing.

Any *mark* may be a signature, and that species of mark which we call a cross (independent of an accompanying name) was early used as a signature of assent, and indeed was designated *signum*. While marksmen have become fewer with the spread of education, the mark of the cross is still recognized by statute law as a method of signing.

Therefore, as the Wills Act required only a *signing* by the testator, and as this requirement of signing only was also found in the statute of frauds, the courts early decided not to be bound by any narrow definition of signing or signature as meaning the writing of one's name, but to give to the word its broadest possible scope and significance, and thus held that any mark or signature made with the intent to bind the maker (in the

case of the statute), or to be a sign (in the case of wills), should be deemed sufficient. As the English courts had still further obliterated from the word "subscription" the idea of place or locality, there was left no measurable distinction between the requirement upon the testator to sign and that upon the witness to subscribe.

In the decisions this broad rule is repeatedly asserted. In *Goods of Susanna Clarke*, 4 Jur., N. S., 243, the will of an illiterate person was executed by her mark, against which was written her maiden name, instead of that properly borne by her in marriage. Says the court: "There is enough to show that the will is really that of the person whose it proposes to be. Her mark at the foot or end of it is a sufficient execution, and what somebody else wrote against the mark cannot vitiate it."

In the *Goods of James Clark*, 2 Curt. 329, the testator had made his mark and requested the vicar to sign for him, which he did with his own name and not that of the deceased. Says the court: "The statute allows a will to be signed for the testator by another person, and *does not say that the signature must be in the testator's name*. Here this gentleman, at the testator's request, signed the will for him, not in the testator's name, but using his own name. I incline to think this is a sufficient compliance with the act."

In *Goods of Bryce*, 2 Curt. 325, the testatrix signed her will by a mark, her name nowhere appearing. Says the court: "Although the name of the testatrix does not appear upon the face of the instrument, the affidavit sufficiently accounts for the manner in which the will was signed. The statute does not say that *the name* of the testator shall appear at the foot of the will. The paper is identified as being the will of the deceased. . . . I am of opinion that the statute is sufficiently complied with."

The foregoing cases deal with the "signing" by the testator. Coming to the subscribing by the witness, it is said in *Goods of Eynon*, 3 L. R. Pro. & D. 92: "No particular form of attestation is necessary, but the act

done by the witness must be intended by him to evidence his attestation of the will. I must find that I can draw an inference from what occurred that the witness *made a mark of some kind*, with the intention to evidence his attestation."

In *Goods of Christian*, 2 Rob. Ecc. 110, it is said: "The attesting witnesses to the so-called codicil have affixed their initials only; however, I have no doubt in the matter, although I believe this is the first instance under the act of the witnesses so signing. *I am not aware that the witnesses can be required to sign their names.* I am of opinion that there is a sufficient subscription on their parts, and, therefore, I decree probate as prayed."

In *Goods of Oliver*, 2 Spinks, 57, it is said: "The statute says the witnesses 'shall attest and subscribe the will.' *It does not say shall write their own names*, so that a mark is held to be a good subscription."

These cases are quoted that there may be no room for misunderstanding of the English decisions or of the text of the book writers. But, as the matter is wholly statutory, they have no value as authority, unless there be an identity in the statutory requirements of this state and England. But there is no such identity. Indeed, our statute seems to have been drawn with the express intent to foreclose and shut out the interpretation given to the English law. Thus, the English statute requires subscription. That word had been judicially declared not to have reference to the place of writing. Our statute says that the will shall be subscribed *at the end thereof*, thus expressly making locality of writing an element of the subscription.

The English statute required a signing. As interpreted by the court, this did not necessitate the signing of the name. By express language our statute commands that a witness shall sign *his name*. In England, therefore, a witness may sign in any one of a multitude of ways; by our law his signing is limited to the expression of his name.

The case of *Meehan v. Rourke*, 2 Bradf. 385, is in no

way opposed to, but rather is in full accord with, this view. The statute of New York, from which ours was taken, likewise requires that the witnesses should *sign their names*. Eliza Green, one of the witnesses to the will under consideration, was unable to write. Her name was correctly written by the doctor, and she then made her mark across it, and acknowledged it to be her mark and signature. The court said that before the revised statutes a witness might attest a will by a mark; as in this state it may be done under section 14 of the Civil Code. The opinion declares: "Our statute requires the witness to '*sign his name*.' . . . Where another person writes the name of the witness and then the witness acknowledges the signature—puts his mark to it, his *signum*—he literally *signs*; and what he signs is his name, i. e., he signs his name, while a mark alone (the learned judge significantly adds) would not be sufficient." Yet a mark alone is held sufficient under the English statute.

I conclude, therefore, that as our law has seen fit to prescribe that the testator shall subscribe his will *at the end thereof*, so it has seen fit to require that attesting witnesses shall sign and shall sign only in one way, that is to say, by affixing their names. In construing a statute the duty of the court is simply to ascertain and declare what is in terms or in substance declared therein, not to insert what has been omitted, *or to omit what has been inserted*. (Code Civ. Proc., sec. 1858.) It cannot be said that some other mode of subscription will answer the purpose, or subserve the statutory requirement, when in truth it does not. As well could it be said that the requirement of two attesting witnesses is not mandatory, and that this will, having been duly attested by one witness, should be admitted to probate.

That the overthrowing of any will works a hardship upon the devisees and legatees is obvious; but the law is no more tender of their claims than it is of the rights of the natural heirs. When a will is proved every ex-

ertion of the court is directed to giving effect to the wishes of the testator therein expressed, but in the proving of the instrument the sole consideration before the court is whether or not the legislative mandates have been complied with.

The judgment and order appealed from are affirmed.

HARRISON, J., TEMPLE, J., and BEATTY, C. J., concurred.

MCFARLAND, J., dissenting.—I dissent. In my opinion, there was in this case a sufficient compliance with the formalities prescribed by the code for the attestation of a will. It is true that the right to make testamentary disposition of property—like most other rights—rests upon the legislative will; but that legislative will has been uniformly exercised in favor of the right in all English speaking countries, and in nearly all others, from time immemorial, so that the right has come to be a usual, well-established, and most important attribute of ownership. Therefore, in dealing with an attempt to exercise that right the general rules of construction should be applied—that is, the provisions of the code “are to be liberally construed with a view to effect its objects.” The signature of the witness Warren in this case, as shown beyond question, would be held good if any written instrument or paper known to the law were involved other than a will, and I see no good reason why the same rule should not apply here. To allow a will to be defeated by the careless (or intentional) misspelling of his name by a subscribing witness would lead, I fear, to great abuses. If a man should not have the right to make a will, let the legislature take it away; but as long as he has it let it be protected as other rights. I think that the judgment should be reversed.

GAROUTTE, J., dissenting.—I dissent. I do not think a man's testamentary disposition of his property should be defeated for the reasons here given. The argument requires a too technical analysis of terms and statutes

in order to arrive at such a result. While the right to dispose of property by will is purely statutory, still it can hardly be said to be a mere matter of legislative grace, for it has become almost an inalienable right—made so by reason of its long practice and approval in all civilized nations. It is conceded that if the testator, Walker, had made a like mistake, and signed his name Warren, it would not have defeated the will; but it is now held that the witness Warren having made the mistake in signing his name Walker, the will is avoided. I have no idea that the legislature, in formulating the statute as to the character of the signatures, ever intended such results to follow; and I am satisfied it never intended to attach any different meaning to the two phrases, namely, “sign his name as a witness,” and “subscribed by the testator”; or that the legislature ever intended to bar a man from being a witness to a will, who was unable to sign his name, any more than it intended to bar a man from making his will, who was likewise so unfortunate.

For the purposes of this statute, the person's mark, properly witnessed, is his name; and any name that the party attaches to the will as a witness is his name. It is not for a contestant of the will to say to a witness: “That is not your name”; and neither is it for the witness to appear upon the stand and say: “That is not my name.” If we are to be so technical in this matter, the statute should have said “*true* name.” The true names of witnesses are often unknown to the testator, and to say that a person could intentionally and corruptly sign a false name to a will as a witness, and thereby defeat it, is to go to great lengths. No case in the books has ever gone that far to my knowledge; still, that doctrine would seem to be declared by the main opinion of the court in the present case. A name signed by mistake of the witness is no different from one signed in fraud. The knave wrote the name as his name, and, for the purposes intended by the testator, it was his name. In the present case the attorney, as a witness, unintentionally



wrote a name which was not his true name, but he intended the writing to be his name, and he made the writing for his name, and for the purposes intended by the testator; and, as to those purposes, it should be held to be his name. If, one hour previous to the signing of the will, he had concluded to change his name to C. G. Walker, and had so signed it, or, for the very purpose of concealing his true name, had signed the will "John Brown," to my mind the will would be legally witnessed, and in the present case the same conclusion should be declared.

VAN FLEET, J., dissenting.—I dissent from the conclusion reached by the majority of the court, and agree with what is said by Justices McFarland and Garoutte.

I think, by a too close adherence to the mere letter of the statute, the court, in the main opinion, loses sight of the evident purpose intended to be subserved by the provision in question. When the witness, Warren, intending in perfect good faith, as is conceded, to write his own name, wrote his own initials, but inadvertently added the name of the testator, instead of his own, it was, to all essential intents and purposes, a signing of his name within the spirit and intent of the statute, since it met every purpose designed to be subserved thereby. And this view, in my judgment, is sustained by the case of *Meehan v. Rourke*, 2 Bradf. 385, cited in the main opinion. There the name of the witness was written by another, and merely *vised* by the mark of the witness himself, although the requirement of the statute, like our own, was, that the *witness* should sign *his name*. But it is said by the surrogate, in addition to the language quoted in the majority opinion: "I think the requisition of the statute sufficiently complied with by the name of the witness being written at the end of the will, and the witness putting his mark thereto. This construction meets the design of the legislature in having the name of the witness, and excluding wills attested only by marks, and does not shut

out the attestation of wills by illiterate persons, when a penman can be found to record the transaction. I should come to any other conclusion with regret, as otherwise I should be compelled very frequently to reject wills attested by marksmen, the experience of this office showing the mode of execution to be very common. But, aside from the consequences, I do not think the rule contended for justified by the language of the statute, or consistent with the distinction made between a witness *writing* his name when he has subscribed the testator's name, and being required, in all other cases only, to '*sign* his name.' "

I think the record shows a sufficient compliance with the requirements of the statutes, and that the deceased should not, by any such slight lapse as is here disclosed, be deprived of the right of testamentary disposition of his property.

Whatever may be our personal views as to the provisions of the law for the distribution of the property of intestates, whether they meet with our approval or otherwise, cannot affect our consideration here. The sole question is whether the testator, in endeavoring to avail himself of the privilege of the law to so dispose of his estate as to meet his own desires, has so far complied with the statute as to make his purpose effectual; and this, I think, he has done, and that the judgment of the lower court should be reversed.

Rehearing denied.

McFARLAND, J., GAROUTTE, J., and VAN FLEET, J., dissented from the order denying the petition for rehearing.

[S. F. No. 275. In Bank.—December 10, 1895.]

**J. D. BOYER, PETITIONER, v. SUPERIOR COURT  
OF THE CITY AND COUNTY OF SAN FRAN-  
CISCO, RESPONDENT.**

**APPEAL—STAY OF EXECUTION—JUSTIFICATION OF SURETIES BEFORE CLERK**

**—OPTION—SECOND JUSTIFICATION—JURISDICTION OF SUPERIOR COURT**

**—PROHIBITION.**—Where exception is made to the sufficiency of sureties upon a stay bond upon appeal, the parties have the option, under the statute, to justify either before a judge of the superior court or the county clerk; and where a justification is had before the county clerk, the court has no power to order the sureties to appear before it for a second justification; and a writ of prohibition will issue from the supreme court to prevent such action of the superior court.

**ID.—AUTHORITY OF COUNTY CLERK—REVIEW BY COURT.**—The county clerk and a judge of the superior court are vested by the statute with equal authority as to the justification of sureties; and there is no provision of law for a review by the trial court of the action of the county clerk in passing upon the sufficiency of the sureties.

**ID.—CONSTRUCTION OF CODE—AUTHORITY TO ORDER NEW BOND.**—The authority given by the amendment of 1895 to section 954 of the Code of Civil Procedure is confined to the ordering of a new bond upon appeals from money judgments, where a perfect bond has been prepared and filed in the first instance, and any imperfections thereto have subsequently arisen; and that amendment does not provide for a further or second justification of the sureties upon the original bond.

**WRIT** of prohibition from the Supreme Court to the Superior Court of the City and County of San Francisco.  
**A. A. SANDERSON, Judge.**

The facts are stated in the opinion of the court.

*J. D. Boyer*, Petitioner in Person.

When an appeal is perfected by filing the required undertaking, it stays all proceedings in the trial court upon the judgment or order appealed from. (Code Civ. Proc., secs. 940, 941, 945, 946; *Lee Chuck v. Quan Wo Chong Co.*, 81 Cal. 222; 15 Am. St. Rep. 50; *People v. Center*, 54 Cal. 236.) The acceptance of a surety as pecuniarily sufficient rests in the reasonable discretion of the court or officer designated by law to approve the bond. (1 Encyclopedia of Pleading and Practice, 1003.) If the bond is insufficient, the remedy is to be furnished

by the court to which the appeal is taken. (*Miller v. O'Reilly*, 84 Ind. 170, 171.)

*Tobin & Tobin*, for Respondent.

The trial court had power to cite the sureties to appear before it for personal examination, in order to determine whether the undertaking was sufficient or not. (*Dobbins v. Dollarhide*, 15 Cal. 374; Code Civ. Proc., sec. 954; Stats. 1845, p. 59.)

GAROUTTE, J.—The present petitioner, J. D. Boyer, moved to vacate and set aside a judgment of foreclosure rendered against defendants in the case of the *Hibernia Savings and Loan Society v. Anna Lewis et al.*, and the motion was denied. Subsequently the court granted plaintiff's motion for a writ of assistance; Boyer appealed from the orders of the court made upon these motions, and the court fixed the amount of his undertaking to stay proceedings upon appeal from the order granting the writ of assistance in the sum of fifteen hundred dollars. Boyer filed a bond in due form, covering both appeals, and the sufficiency of the sureties was excepted to. Upon due notice to the respondent, and in the presence of its attorneys, the sureties justified before the county clerk. Some days thereafter respondent, upon notice, moved the court for permission to execute its judgment by aid of the writ of assistance, and further asked that an order be made striking the said undertaking from the files of the court. This action was prayed for upon the ground that the evidence taken before the county clerk at the time of justification showed the bond to be insufficient by reason of the poor financial standing of the sureties. Upon the hearing of these motions the court examined the testimony taken upon the justification before the county clerk, and thereupon made an order that said sureties on said undertaking appear before him (the judge) upon the ensuing day, at 10 A. M., to then and there justify, and also stated to petitioner Boyer that if they did not so appear and jus-

tify the writ of assistance would be enforced by a further order. The present proceeding is an application for a writ of prohibition to restrain the threatened action of the trial court.

The petitioner, Boyer, perfected his appeal when he filed the undertaking heretofore referred to, and, the appeal having been perfected, all the proceedings upon the order for a writ of assistance were stayed. (Code Civ. Proc., sec. 946.) Still the stay of proceedings is not necessarily permanent and final pending the appeal, for by a failure to comply with the provisions of section 948 of said code, in reference to the exception and justification of sureties, it becomes nugatory and of no avail; but, if compliance is had with the demands of that section, the stay continues perfect and complete. By the section referred to, upon an exception to the sufficiency of the sureties, they are required to justify after notice to the respondent, "before a judge of the court or county clerk," and in this case the sureties justified before the county clerk, upon due notice to the other side, and in their presence. This would seem to end the matter and make the stay bond permanent pending the appeal. In this regard the statute furnishes the measure of the power, and we see no authority in the statute authorizing the action of the trial court in ordering a second and summary justification. The county clerk and a judge of the superior court are vested by the statute with equal authority as to the justification of sureties; and there appears to be no provision of law for a review by the trial court of the action of the county clerk in passing upon the sufficiency of the sureties upon the bond.

It is further suggested that section 954 of the Code of Civil Procedure, as amended by statutes of 1895, page 59, confers authority for the action of the court complained of in ordering a second justification; but that amendment is not broad enough to cover the facts of the present case, and this is apparent for many reasons, viz.: 1. It contemplates that a perfect bond had been

prepared and filed in the first instance, and that the imperfections thereto subsequently arose; 2. It contemplates appeals from money judgments; 3. It gives the court or judge authority only to order a new bond; and 4. It in no way provides for a further or second justification of the sureties upon the original bond. Counsel for respondent also relies upon the case of *Dobbins v. Dollarhide*, 15 Cal. 374. The facts of that case are quite meager, indicated by the opinion, but, as we understand them, the sureties upon the bond, at the time set for their justification, were unable to justify upon the stay bond, but did justify upon the appeal bond; and the court said that in such case respondent should move the trial court for the execution of the judgment, and that undoubtedly would be the proper procedure, for the stay had lapsed by reason of the failure of justification.

We conclude the trial court had no power to order the second justification to take place before it or a judge thereof, any more than it had the power to make such an order as to the first justification; and clearly the statute gives the parties the option of going either before a judge of the superior court or the county clerk for that purpose. As to what the remedy is for a respondent where, after justification, he should discover that the sureties perjured themselves at the hearing, it is not necessary to decide. Possibly legislation is needed to meet the case.

It is ordered that the writ issue as prayed for.

VAN FLEET, J., HARRISON, J., MCFARLAND, J., TEMPLE, J., and HENSHAW, J., concurred.

[Crim. No. 114½. Department One.—December 13, 1895.]

## EX PARTE ALFRED CLARK, ON HABEAS CORPUS.

**CONTEMPT OF COURT—FINDINGS OF FACT—HABEAS CORPUS.**—The findings of fact recited by the court in the order of commitment of a person committed for contempt must be held to have been authorized by the evidence, and are not subject to be controverted, upon writ of *habeas corpus*.

**ID.—PRIOR PUNISHMENT FOR CONTEMPT—AUTHORITY OF COURT—VIOLATION OF SUBSEQUENT ORDER.**—The court is not deprived of authority to punish for contempt, by reason of a prior imprisonment for contempt in a matter distinct from that for which the subsequent order was made, where it appears that the contempt first punished was committed prior to the first imprisonment, and that the offense subsequently punished is the violation of a subsequent order which could not have been made the basis of the prior contempt.

**ID.—REFUSAL OF INSOLVENT TO SURRENDER PROPERTY.**—After an adjudication of insolvency, regardless of whether the proceeding is in voluntary or involuntary insolvency, the insolvent is at all times subject to an examination by the court in relation to his property or estate, and if upon such examination the insolvent shall admit or the court shall find that he has omitted certain property from his inventory, the court has the same authority to direct him to deliver this property to the assignee, as it had to direct him to file the inventory, and he may be punished for contempt for refusal to comply with such direction.

**APPLICATION in the Supreme Court for discharge upon writ of *habeas corpus*.**

The facts are stated in the opinion of the court.

*G. W. Chamberlain*, for Petitioner.

**HARRISON, J.**—The petitioner herein was adjudicated an insolvent upon the application of certain of his creditors, and thereafter, under the order of the court, filed a schedule and inventory, as required by the Insolvent Act. Upon the application of the assignee of the insolvent, and after notice to him, the superior court found that certain personal property belonging to the insolvent's estate had been concealed by him from his assignee, and sold subsequent to his adjudication, and that he had received therefor the sum of two hundred and seventy-five dollars, which he had appropriated to his own use; and on December 4, 1895, made an order that he pay the said sum of money to the assignee on

or before the sixth day of December, 1895. A copy of this order was served upon him on the same day that it was made, and on the sixth day of December, and again on the 7th, a demand in writing was made upon him by the assignee that he pay to him the said sum of money. Upon his failure to make such payment, the assignee served him with written notice that on the tenth day of December he would move the court for an order adjudging him guilty of contempt for not obeying said order. The matter came up for hearing at the time fixed in said notice, the petitioner appearing in person and also by attorney, and, after hearing evidence and argument thereon, the court found that the petitioner herein had willfully and contumaciously refused to obey the order of December 4th, requiring him to pay said sum of money, and adjudged him guilty of contempt by reason of his willful disobedience and violation of said order; and directed that he be committed to the custody of the sheriff and imprisoned in the county jail until he should pay the said sum of two hundred and seventy-five dollars to the assignee; and, being taken into custody by the sheriff, he sued out the present writ.

The findings of fact recited in the order of commitment must be held to have been authorized by the evidence before the court, and are not subject to controversy in this proceeding.

The Insolvent Act requires the insolvent to file in the court a schedule of his debts and liabilities, and an inventory containing an accurate description of all his estate. The condition upon which the discharge in insolvency is to be granted is that the petitioner has surrendered all his property, and his original petition to be adjudged an insolvent not only imposes the obligation, but also implies an agreement by him that he will make such surrender. There is no distinction in procedure between voluntary and involuntary insolvency after an adjudication has been made. By section 47 of the Insolvent Act, the insolvent is at all times subject to an examination by the court in relation to his



property or estate. If upon such examination the insolvent shall admit that he has omitted certain property from his inventory, and that he has it in his possession, the court has the same authority to direct him to deliver this property to the assignee as it had to direct him to file the inventory in the first place; and, for the purpose of this proceeding, a finding of the court that the petitioner concealed this property, and received the proceeds of its sale, is to be regarded with the same effect as would an admission of that fact by the insolvent. *Ex parte Hollis*, 59 Cal. 405, referred to at the argument, differs essentially from the present case, in that in that case Hollis was not the insolvent, but claimed to hold the property adverse to the insolvent and to all the world, by virtue of a title antedating the proceeding in insolvency, and it was held that, as he was not a party to the proceeding in insolvency, the court could not try the issue of his title in a summary proceeding to punish him for contempt for not delivering it up. In the present case, however, there was no claimant of property before the court, other than the insolvent himself, and a court would be powerless indeed, if it could not compel the insolvent whose proceedings were before it for adjudication to deliver his property to the assignee, or to punish him for contempt for disobedience to its order.

The court was not deprived of authority to punish the petitioner for violating this order by reason of having on December 4th caused him to be imprisoned for contempt for twenty-four hours. The contempt for which he was then punished is distinct from that for which the present order was made, and was committed prior to that date, whereas the offense for which he is now under punishment is the violation of an order made on that day, and which by its terms could not be made the basis of a contempt until after December 6th.

The writ is discharged and the prisoner remanded.

VAN FLEET, J., and GAROUTTE, J., concurred.

[S. F. No. 4. Department Two.—December 13, 1895.]

**IN THE MATTER OF THE ESTATE OF JAMES CONNORS,  
DECEASED. PHILIP CONNORS, RESPONDENT, v. J.  
K. SECORD, APPELLANT.**

**ESTATES OF DECEASED PERSONS—RIGHT OF ADMINISTRATION—COMPE-  
TENCY OF FATHER OF DECEASED—IMPROVIDENCE—QUESTION OF FACT**

Where the competency of the father of a deceased person, who petitioned for letters of administration upon the estate of his son, was contested by the public administrator, by reason of the alleged improvidence of the father rendering him incompetent to serve as administrator, the question as to whether the petitioner was incompetent to serve as administrator by reason of his improvidence or not is a question of fact to be determined by the court below, in view of all the evidence before it; and where the evidence is substantially conflicting, and there is sufficient evidence to sustain a finding that the father was not improvident or incompetent, its determination cannot be disturbed on appeal upon mere technical grounds.

**ID.—NATURE OF IMPROVIDENCE.**—The improvidence which is a ground of exclusion of a relative of the deceased from administration is that want of care or foresight in the management of the property which would be likely to render the estate and effects of the intestate unsafe, or liable to be lost or diminished in value by improvidence, in case administration thereof should be committed to such improvident person.

**ID.—EVIDENCE—CHARACTER—GENERAL REPUTATION—TESTIMONY AS TO IMPROVIDENCE.**—Although, as a general rule, character can only be proved by general reputation, and cannot be shown by evidence of particular and specific facts, but may be proved by negative testimony, yet, where the testimony adduced as to the improvidence of the defendant not only assailed his general reputation for providence, industry, and sobriety, but stated that he squandered his money for liquor and contributed nothing to the support of his family, it is competent to meet and overcome such evidence by proof that he had accumulated property, was never intoxicated, had supported his wife and family while residing with him, had never squandered his money, and was known as an honest, sober, and industrious man, and always paid his bills.

**ID.—CONTEST OF ADMINISTRATION—FAILURE TO MAKE FINDINGS—IMMATERIAL OMISSION.**—Conceding without deciding that upon a contest for the right of administration of the estate of a deceased person findings are necessary, an appellant is not aggrieved by the failure of the court to make findings where it is apparent that the court must have believed the witnesses for the respondent, and that if any findings had been made, they must have been adverse to the appellant.

**APPEAL** from an order of the Superior Court of Santa Clara County granting letters of administration. **W. J. LORIGAN**, Judge.

The facts are stated in the opinion.

*J. J. O'Toole*, for Appellant.

Improvidence is an attribute of character, and an attribute of character can only be proved or disproved by proof of general reputation. (1 Greenleaf on Evidence, sec. 55; 3 Am. & Eng. Ency. of Law, 114, 115; *Evans v. Delay*, 81 Cal. 103; *Coope v. Lowerre*, 1 Barb. Ch. 45-48; *In re Bauquier*, 88 Cal. 302.) The absence of a finding of fact on the question of improvidence is fatal. (Code Civ. Proc., secs. 632-34; *Dowd v. Clarke*, 51 Cal. 262; *Speegle v. Leese*, 51 Cal. 415; *Haffenegger v. Bruce*, 54 Cal. 416; *Savings etc. Soc. v. Thorne*, 67 Cal. 53; Hayne on New Trial and Appeal, secs. 240, 246; *Ball v. Kehl*, 95 Cal. 606.) When issues of fact are tried in probate matters, findings of fact are proper. (Code Civ. Proc., secs. 1313, 1716; *Estate of Crosby*, 55 Cal. 575; *In re Arguello*, 85 Cal. 153.)

*William A. Bowden*, for Respondent.

Improvidence refers to habits of mind and conduct which become a part of the man, and render him generally, and under all circumstances, unfit for the trust or employment in question. (*Emerson v. Bowers*, 14 N. Y. 449; *Root v. Davis*, 10 Mont. 228; Alexander and Joseph's Probate Practice, sec. 55, p. 91, note.) Courts should exercise their power of refusing to appoint a person entitled to be appointed administrator only upon clear and convincing evidence establishing disqualifying facts. (*Estate of Pacheco*, 23 Cal. 480; *In re Bauquier*, 88 Cal. 310-13; *Coope v. Lowerre*, 1 Barb. Ch. 45; *Stearns v. Fiske*, 18 Pick. 24.) Findings of fact are not necessary in probate proceedings. (*Estate of Sanderson*, 74 Cal. 201; *Estate of Crosby*, 55 Cal. 574; *Estate of Moore*, 96 Cal. 522; *In re Arguello*, 85 Cal. 152; *Miller v. Lux*, 100 Cal. 613.)

BELCHER, C.—James Connors died intestate in the county of Santa Clara, leaving as his heirs at law his

father and mother and two sisters. In due time the father, Philip Connors, filed in the superior court of that county his petition, alleging that the estate of the decedent consisted of personal property, and the value of it did not exceed the sum of fifteen hundred dollars, and praying that letters of administration upon the estate be issued to him. Thereafter J. K. Secord, the public administrator of the county, filed his petition alleging that the father of the decedent, by reason of his improvidence, was incompetent to serve as administrator, and that the mother of the decedent, by reason of the fact that she asserted a claim to all of said estate, was incompetent to serve as administratrix; that by reason of the disqualification of the father and mother of the decedent to administer the estate, the petitioner was entitled to act as administrator thereof, and praying that letters of administration be issued to him.

The two petitions came on regularly for hearing at the same time, and "the court having heard the testimony of witnesses duly sworn and examined on the part of both said petitioners," it was ordered that the petition of J. K. Secord be denied, and that the petition of Philip Connors be granted, and that letters of administration be issued to him upon his giving a bond in the sum of three thousand dollars.

From this order petitioner Secord appealed.

Two points only are made for a reversal. They are:

1. That the order was not justified by the evidence, because it was shown thereby that Connors was incompetent to execute the trust by reason of his improvidence;
2. That no findings were filed.

Under our statute the father was entitled to be appointed administrator of the estate of his deceased son, unless he was "adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity." (Code Civ. Proc., secs. 1365, 1369.)

In support of the first point appellant called two witnesses. P. A. Donavan testified: "I know Philip Con-

nors, and have known him for a number of years; his general reputation for providence, industry, and sobriety is bad. I never saw him intoxicated but once. I never heard of his having any trouble except with me. . . . I am not friendly with Philip Connors, and have not been for some time." Mrs. Bridget Connors testified that she had been married to Philip Connors twenty-five or twenty-six years, and had separated from him; that "Connors always squandered nearly all he earned for liquor. At one time I gave him a hundred dollars to pay the funeral expenses of his dead sister; he did not pay them, but squandered the money for liquor. He would work during the day, and at night go out to the saloons and stay out nearly all night; when he would return home he would be intoxicated. He did most of his drinking and carousing at night. He has contributed nothing to the support of myself and family for the past five years. The general reputation of Philip Connors for providence, industry, and sobriety is bad."

On the other hand, the respondent was called as a witness in his own behalf, and testified that he had resided in the city of San Jose for twenty years; that he bought a lot in that city nearly twenty years ago, and a few years later built a house on it, and that the purchase price was paid entirely by him; that for the past five years he has been engaged in the express business and had a horse, wagon, and harness which he purchased and paid for himself; that he resided alone in his house and kept it in as good condition as he was able; that he always remained at home in the evenings; that he never was intoxicated in his life and seldom drank intoxicating liquors; that while his wife and family resided with him he always supported them entirely with his earnings; and that "I am entirely out of debt, have paid for my house and lot, and do not owe a cent to anybody." And, on being recalled, he further testified: "I never squandered my money or my earnings in drink or in any other way. I never squandered the money paid for my dead sister's funeral expenses, or at all. I

worked during the day, but never went to the saloons and staid nearly all night, and never returned home intoxicated. I never drank excessively at night, or at all, and never caroused. My earnings were spent at home."

Seven other witnesses were called for respondent. One of them testified that respondent purchased from him the lot, which he now owns, some twenty years ago, and that "I know his habits and consider him a first rate, industrious man." Four of them testified that they had known respondent for the past five years; that they had never seen him intoxicated; saw him about town on his wagon; had only business dealings with him; and that he seemed to be an honest, sober, and industrious man. And two of them testified that they had known respondent for five years; that he came to their store to buy provisions; that they did not think they had ever seen him intoxicated; that he seemed to be an honest, sober, and industrious man, and that he always paid his bills.

Improvidence is defined to be: "Want of care or foresight in the management of property." (10 Am. & Eng. Ency. of Law, 321.) And in *Coope v. Lowerre*, 1 Barb. Ch. 45, it is said: "The improvidence which the framers of the Revised Statutes had in contemplation, as a ground of exclusion, is that want of care or foresight in the management of property which would be likely to render the estate and effects of the intestate unsafe, and liable to be lost or diminished in value by improvidence, in case administration thereof should be committed to such improvident person."

Whether the respondent was incompetent to serve as administrator by reason of his improvidence or not was a question of fact to be determined by the court below in view of all the evidence before it, and its determination cannot be disturbed on appeal upon mere technical grounds.

It is claimed for appellant that improvidence is an attribute of character, which can only be proved or dis-

proved by evidence of general reputation; and that all the evidence introduced by respondent to disprove the charge of improvidence was inadmissible and should be disregarded.

We do not think this claim can be sustained. The general rule undoubtedly is as stated, that "character is a fact which is proved by another fact—general reputation. It cannot be shown by evidence of particular and specific facts, but may be proved by negative testimony." (3 Am. & Eng. Ency. of Law, 114.) The evidence of respondent appears to have been offered and received without any objection, and, in our opinion, it was sufficient to meet and overcome that offered by appellant. It was not alone made up of particular and specific facts, but tended directly and strongly to negative the charge made by appellant.

As to the second point, conceding, without deciding, that in a case of this kind findings are necessary, still the appellant was in no way "aggrieved" by the failure of the court to make findings. The rule is that the failure to find on a material issue will not warrant a reversal of the judgment, if the findings omitted must have been adverse to the appellant. (*People v. Center*, 66 Cal. 551; *Murphy v. Bennett*, 68 Cal. 528; *Demartin v. Demartin*, 85 Cal. 75.)

Here it is apparent that the court must have believed the witnesses for respondent, and, therefore, if findings had been made, they must have been adverse to appellant.

It follows that the order appealed from should be affirmed.

SEARLS, C., and HAYNES, C., concurred.

For the reasons given in the foregoing opinion the order appealed from is affirmed.

McFARLAND, J., HENSHAW, J., TEMPLE, J.

[No. 16016. Department Two.—December 13, 1895.]

**EMMA VANCE, RESPONDENT, v. CHARLES RICHARDSON, APPELLANT.**

**JURY TRIAL—RIGHT OF PEREMPTORY CHALLENGE—WAIVER.**—It is proper practice to have twelve jurors in the box before requiring the parties to exercise their peremptory challenges, and then to call another juror whenever a peremptory challenge shall have been exercised; and then the parties are to challenge alternately, and if one of them does not exercise his right of challenge in his turn, after the other party has expressed his satisfaction with the full panel, he cannot afterward be allowed another peremptory challenge.

**ACTION FOR ASSAULT AND BATTERY—EVIDENCE—GENERAL REPUTATION OF DEFENDANT.**—In a civil action for assault and battery. evidence of the general reputation of the defendant for peace and quiet is not admissible.

**ID.—GENERAL RULE IN CIVIL ACTIONS—EVIDENCE OF GOOD CHARACTER—EXCEPTIONS.**—The general rule is that, in civil actions, evidence of the good character of the defendant is not admissible, and the exceptions consist mostly of cases where the character of some person is the very issue involved; but an action for assault and battery is not one of the exceptions.

**ID.—EVIDENCE OF CONVERSATION—EXAMINATION IN CHIEF.**—The rule that upon cross-examination the whole of a conversation may be brought out in regard to which there has been any evidence in chief does not authorize a party whose witness is testifying in chief to ask the witness to state the whole of a conversation, which may involve a mass of matter not relevant; and a refusal of the court to permit such statement is not prejudicial, as the party has the right to call the attention of the witness to any further relevant declarations.

**APPEAL from a judgment of the Superior Court of Humboldt County. G. W. HUNTER, Judge.**

The facts are stated in the opinion of the court.

*J. W. Turner*, for Appellant.

The lower court erred in refusing to allow defendant to exercise his right of peremptory challenge after having passed it for the time being. (Code Civ. Proc., sec. 601; *Taylor v. Western Pac. R. R. Co.*, 45 Cal. 323; *Silcox v. Lang*, 78 Cal. 123; *Hunter v. Parsons*, 22 Mich. 96; *Adams v. Olive*, 48 Ala. 551; *Atchison etc. R. R. Co. v. Franklin*, 23 Kan. 74; *United States v. Reed*, 2 Blatchf. 435; *Torrent v. Yager*, 52 Mich. 506.) In a trial for battery the character of the witness for peace and quiet



can be shown. (*State v. Henry*, 5 Jones, 66; *People v. Ashe*, 44 Cal. 292; 2 Russell on Crimes, 754.) When part of a conversation is given in evidence, the whole may be given, either on direct or cross-examination. (Code Civ. Proc., secs. 1854, 2048.)

*Frank McGowan*, and *Otto C. Gregor*, for Respondent.

Peremptory challenges must be exercised alternately. (Code Civ. Proc., sec. 601.) Evidence of the reputation of defendant for peace and quiet is immaterial in a case of this kind. (*Anthony v. Grand*, 101 Cal. 237; *Brown v. Evans*, 17 Fed. Rep. 912; *Elliott v. Russell*, 92 Ind. 526; 1 Greenleaf on Evidence, sec. 55; 1 Wharton on Evidence, sec. 47.)

**McFARLAND, J.**—Appeal by defendant from a judgment rendered for plaintiff. The action is to recover damages for an alleged assault and battery committed by appellant upon the person of respondent. The jury gave damages in the sum of four hundred and fifty dollars. The only questions involved relate to certain alleged errors of law.

Appellant contends that the court erred in a ruling concerning his right of peremptorily challenging jurors. It seems that during the examination of the jurors, and before the panel was filled, each party had alternately exercised peremptory challenges. When the panel was completed it was appellant's turn to challenge, and his attorney said: "I will pass our peremptory for the present." The court asked him if he was satisfied with the jury. Counsel replied that it was his right then to challenge, but that he waived it for the present; that if plaintiff exercised his right the panel would be filled again; and that if plaintiff did not exercise a challenge then appellant would nevertheless have the right to challenge another juror. The court informed him that the court did not understand it that way; and that if he did not then exercise his peremptory challenge, and the plaintiff should express his satisfaction with the jury,

appellant would not afterward be allowed another peremptory challenge. Appellant excepted. The attorney for respondent then said: "I am satisfied with the jury." The attorney for appellant then said: "We now ask the court to permit us to exercise our right of peremptory challenge"; and the court said: "I will deny the request." Appellant excepted. That was all that occurred. Appellant did not offer a challenge to any designated juror.

Assuming that the above presents a definite ruling that can be reviewed, and not a mere abstraction, we see no error committed by the court—and certainly none of which appellant can justly complain. It has been said several times that it is the proper practice to have twelve jurors in the box before requiring the parties to exercise their peremptory challenges, and then to call another juror whenever a peremptory challenge shall have been exercised. (*People v. Scoggins*, 37 Cal. 679; *Taylor v. Western Pac. R. R. Co.*, 45 Cal. 323; *Silcox v. Lang*, 78 Cal. 118.) Then the parties must challenge alternately as provided by section 601 of the Code of Civil Procedure. In the case at bar the parties, without objection by either, adopted the practice of alternately exercising their peremptory challenges while the jurors were being examined and before the panel was filled. Under this method, when the panel was filled, it was appellant's turn, as he admits, to challenge, and, if he desired to do so, he ought to have exercised his right then. He does not complain that the court forced him to challenge before the panel was full; he could not have made such a complaint, because the panel was full. We do not see, therefore, how he was prejudiced, or that he has any just right to complain. He merely sought an advantage to which he was not entitled. There is nothing in this view inconsistent with any of the authorities cited.

The court did not err in refusing to allow testimony of the general reputation of appellant for peace and quiet. The general rule is, that in civil actions, evidence of the good character of the defendant is not ad-

missible. Wharton, having stated that good character may be shown in criminal cases where life or liberty is at stake, says: "But whether it be because in a civil case between two private parties both parties stand in this respect on the same footing, or whether it be because most civil suits grow out of, or may be supposed to grow out of, honest misconceptions of rights, English and American courts have agreed in holding that, so far as it concerns the proofs in civil issues, the character of either party is as a rule irrelevant." (1 Wharton on Evidence, sec. 47.) The author then notes the few exceptions to the rule, which consist mostly of cases where the character of some person is the very issue involved—as, for instance, the character of the employe, where the employer is sued for the former's negligence. Character for chastity in certain actions is admissible; some courts have held that in a libel suit the plaintiff may prove his good character, and also in actions for certain kinds of fraud; and there are other exceptions to the rule not necessary to be here mentioned. Greenleaf states the rule in this language: "In civil cases such evidence is not admitted, unless the nature of the action involves the general character of the party, or goes directly to affect it." (1 Greenleaf on Evidence, sec. 54.) But an action for assault and battery is not one of the exceptions; and both Wharton (Wharton on Evidence, sec. 47) and Greenleaf (1 Greenleaf on Evidence, sec. 55) say, affirmatively, that evidence of character is not admissible in such action. The following are a few of the many adjudicated cases in which it has been so held: *Elliott v. Russell*, 92 Ind. 526; *Gebhart v. Burkett*, 57 Ind. 378; *Porter v. Seiler*, 23 Pa. St. 424; *Soule v. Bruce*, 67 Me. 584; *Givens v. Bradley*, 3 Bibb. 192. Section 2053 of the Code of Civil Procedure is merely a concise statement of the rule as it is to be found in the text-books and judicial decisions.

When appellant was on the witness-stand, and after he had testified at length to many things, including conversations with respondent, his counsel said to him

at a certain point in the examination: "State that whole conversation." And to this an objection by respondent was sustained. Appellant contends that this ruling was error; but the only argument he makes on the point is founded on sections 1854 and 2048 of the Code of Civil Procedure, which sections refer entirely to cross-examinations, and have no relevancy to this point. The conversation might have involved a mass of matter not relevant; and the ruling was not prejudicial, for if appellant's counsel had anything further to prove that was relevant with respect to any declaration of respondent, he could have called the attention of his witness to it. He continued to testify to further occurrences and conversations between respondent and himself.

There are no other points which need special notice. We do not think that the court erred in any ruling upon instructions asked by the parties, or in the instructions given on its own motion. Other minor points are of no importance.

The judgment is affirmed.

HENSHAW, J., and TEMPLE, J., concurred.

Hearing in Bank denied.

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[No. 15969. Department Two.—December 13, 1895.]

AARON BARNES, SR., APPELLANT, v. JESSIE B. BARNES, RESPONDENT.

**ANTENUPTIAL SETTLEMENT—FALSE REPRESENTATIONS AS TO CHARACTER OF WIFE—VALIDITY OF SETTLEMENT.**—An antenuptial settlement, made in contemplation of marriage, is based upon a sufficient consideration, and where the marriage has been consummated, and the relation of husband and wife has been maintained for several years, the antenuptial settlement cannot be set aside upon the ground that the wife personally, and by her friends and agents, falsely represented that she was a virtuous, worthy, chaste, and moral woman, whereas she was in fact a woman of unchaste and immoral character.

ID.—VALIDITY OF MARRIAGE—PREVIOUS UNCHASTE CONDUCT—PUBLIC POLICY—MAXIM.—Previous unchaste conduct, although concealed, does not invalidate a marriage; but public policy opens marriage as the gateway for repentance and virtue, and the maxim *caveat emptor* governs in regard to a marriage settlement.

APPEAL from a judgment of the Superior Court of the County of Sonoma. S. K. DOUGHERTY, Judge.

The facts are stated in the opinion of the court.

*George Pearce*, and *W. F. Russell*, for Appellant.

All marriages procured by fraud or involving palpable error are void. (Schouler's Domestic Relations, 34, 35; *Scott v. Shufeldt*, 5 Paige, 43; Civ. Code, sec. 82.) As to matters peculiarly within the knowledge of the parties, *caveat emptor* applies, and the parties are put upon reasonable inquiry. (Schouler's Domestic Relations, 36, 37.) This doctrine does not apply where a woman was pregnant by another man. (*Reynolds v. Reynolds*, 3 Allen, 605; *Foss v. Foss*, 12 Allen, 26; *Crehore v. Crehore*, 97 Mass. 330; 93 Am. Dec. 98; *Baker v. Baker*, 13 Cal. 87; *Montgomery v. Montgomery*, 3 Barb. Ch. 132.) The agreement of defendant to serve plaintiff during their joint lives was part of an entire contract, and failing to perform in whole or part she cannot retain the consideration paid. (*Hutchinson v. Wetmore*, 2 Cal. 311, 312; 56 Am. Dec. 337; *Haskell v. McHenry*, 4 Cal. 411; *Jones v. Post*, 6 Cal. 104.) Nor was the marriage of the defendant with plaintiff even a part performance of her part of the contract, as to the property sued for. (*Peek v. Peek*, 77 Cal. 106; 11 Am. St. Rep. 244.)

*A. B. Ware*, for Respondent.

The consideration of marriage is the highest known to the law, and defendant is entitled to hold the property precisely as if she had paid in money the full value of the property. (*Otis v. Spencer*, 102 Ill. 622; 40 Am. Rep. 617-22, note; *Prewitt v. Wilson*, 103 U. S. 22; *Pierce v. Harrington*, 58 Vt. 649; Schouler's Domestic Relations, 2d ed., 263; *Verplank v. Sterry*, 7 Am. Dec. 362, note; *Conner v. Stanley*, 65 Cal. 186; *Smith v. Allen*, 5

Allen, 454; 81 Am. Dec. 758.) By the marriage all acts of misconduct previous thereto are forgiven. Matrimonial offenses are those committed after, and not before, marriage. (Schouler's Domestic Relations, 2d ed., 36, 37; *Varney v. Varney*, 52 Wis. 120; 38 Am. Rep. 726-32; *Merritt v. Scott*, 50 Am. Dec. 371, note; Bishop on Marriage and Divorce, 3d ed., secs. 100, 101, 103, note 2; sec. 105, note 1; sec. 118.) The promise to live with plaintiff during their joint lives had entirely exhausted itself when it entered into the marriage contract, and was not the consideration for the transfer of the property. (*Ellison v. Jackson Water Co.*, 12 Cal. 553.) The validity of a marriage contract does not rest upon any stipulations concerning accidental qualities. (*Varney v. Varney*, *supra*; Schouler's Domestic Relations, 2d ed., 36.) A man takes a wife for better or for worse, whether she has the qualities or not. (*Varney v. Varney*, *supra*; Walker's American Law, 247, citing *Wier v. Still*, 31 Iowa, 107; *Long v. Long*, 77 N. C. 304; 24 Am. Rep. 449.) *Caveat emptor* is the necessary maxim of the law. (Schouler's Domestic Relations, 2d ed., 36.)

MCFARLAND, J.—A demurrer to the amended complaint was sustained; and plaintiff declining to further amend, judgment was rendered for defendant. Plaintiff appeals from the judgment.

The demurrer was properly sustained, and the judgment must be affirmed, because the complaint does not state facts sufficient to constitute a cause of action.

There are two counts in the complaint. In the first it is averred that on July 18, 1885, plaintiff conveyed and transferred to defendant certain real and personal property in consideration that defendant "should and would marry plaintiff and live with him during the remainder of their joint lives"; that in pursuance of said promise defendant did the next day, July 19th, intermarry with plaintiff, and thenceforward lived with plaintiff as his wife continuously until some time in August, 1892, when she left plaintiff without his con-

sent and, as he alleges, without just cause, and has since refused to live with him.

In the second count, after a restatement of the facts stated in the first count, it is also averred that at and immediately preceding the time of said marriage plaintiff was desirous of marrying "some virtuous, worthy, chaste, and moral woman who would live with him during his life"; that the defendant personally, and by her friends and agents, represented and stated to him that she was such a woman; that relying upon and believing such representations and statements, and in consideration thereof, he made the said conveyance and transfer of said property; that said representations were false, and defendant was "a woman of unchaste, unworthy, and immoral character"; and that he did not discover that said representations were false until within three years next before the commencement of this action.

The prayer is for a reconveyance of the property and twenty thousand dollars damages.

The consideration for the transfer was the promise of the respondent to marry the plaintiff, which promise she kept. The averment that she promised to live with him during their joint lives is of no consequence; it was included in the marriage contract itself, and its separate averment has no significance. Nor is there any legal value to the averments that respondent represented at the time of the marriage that she was a worthy and chaste woman, and that said representation was not true. Previous unchaste conduct, although concealed, does not invalidate a marriage. "Public policy pronounces otherwise and opens marriage as the gateway to repentance and virtue." *Caveat emptor* governs. (Schouler's Domestic Relations, sec. 23, and cases cited.) An executed contract of marriage, accompanied by full consummation, differs in many respects from ordinary contracts. It creates a *status* which society is interested in maintaining. "In that contract of marriage which forms the gateway to the *status* of marriage the parties take each other for better, for worse, for richer, for

poorer, to cherish each other in sickness and in health; consequently a mistake, whether resulting from accident, or in general from fraudulent practices, in respect to character, fortune, health, or the like, does not render void what is done. . . . A man who means to act upon such representations should verify them by his own inquiries. The law presumes that he uses due caution in a matter in which his happiness for life is so materially involved, and it makes no provision for the relief of a blind credulity, however it may have been produced." (1 Bishop on Marriage and Divorce, 6th ed., sec. 167, and cases there cited.) It is true that when the woman is, at the time of the marriage, pregnant with child by another man, and the pregnancy is unknown to the husband, the marriage may be avoided; but that is because she is, at the time, incapable of bearing a child to her husband, and therefore unable to perform an important part of the marriage contract. (*Reynolds v. Reynolds*, 3 Allen, 605; *Baker v. Baker*, 13 Cal. 87.) But even that rule has been held not to obtain where the husband knew of the pregnancy, but had the mistaken belief that the woman had not been unchaste with any man other than himself. (*Foss v. Foss*, 12 Allen, 26.) Therefore, in the case at bar the marriage was neither void nor voidable, even if all the averments of the complaint are true; and as the marriage, which was the very highest kind of a consideration, was the consideration for the conveyance of the property, there is no ground for setting aside the conveyance, or for any other relief asked. The case put in the argument of a woman merely going through the marriage ceremony and then refusing to act further as a wife has no pertinency to the case at bar. In such a case it might be held, perhaps, that the contract to marry was not actually performed; but here the marriage was fully consummated, and the relation of husband and wife maintained for years.

The judgment is affirmed.

— HENSHAW, J., and TEMPLE, J., concurred.



[S. F. No. 40. Department Two.—December 13, 1895.]

**SARAH PREY, RESPONDENT, v. W. H. STANLEY,  
APPELLANT.**

**QUIETING TITLE—HUSBAND AND WIFE—HOMESTEAD—SEPARATE PROPERTY OF WIFE—PARTIES—JOINT TENANCY.**—In an action to quiet title brought by a wife, in respect of her separate property, the husband is not a necessary party, although a homestead had been declared upon the premises for the joint benefit of herself and her husband; and it is immaterial whether the homestead be considered as creating a joint tenancy or not, the wife being permitted to sue alone for the enforcement or protection of any right which she may have in her separate property, even if the right be that of a joint tenant only.

**ID.—GIFT FROM SON TO MOTHER—CONTRACT IN RESTRAINT OF ALIENATION—VOID CONDITION.**—Where a son purchases land which is conveyed to his mother as a gift, a subsequent contract reciting such acquisition of the land by her, and that the purchase money for the same was furnished as a gift by the son, and containing a covenant that the land should not be sold or conveyed without his consent, and that he was to be the manager thereof for her benefit, and that upon her death it was to be divided between her lawful heirs, is void as imposing a restraint upon alienation repugnant to the interest created in the property, and a subsequent conveyance from the mother to her daughter in consideration of love and affection, to the exclusion of her son, conveys the entire title to the daughter.

**ID.—PUBLIC POLICY—NO ESTOPPEL BY INVALID CONTRACT.**—The restraint sought to be imposed upon the mother's power of alienation being void as against the policy of the law, the daughter's assent thereto by her signature to the contract cannot estop her to allege its invalidity.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. **WALTER H. LEVY, Judge.**

The facts are stated in the opinion.

*Nagle & Nagle*, for Appellant.

Whatever the character of the property might have been before, it was, by the declaration of homestead, converted into the joint property of the husband and wife. (Civ. Code, secs. 1237, 1242, 1263, 1265; *Gleason v. Spray*, 81 Cal. 219; 15 Am. St. Rep. 47; *Carter v. McQuade*, 83 Cal. 278; *Burkett v. Burkett*, 78 Cal. 310; 12 Am. St. Rep. 58; *Oaks v. Oaks*, 94 Cal. 66; *Taylor v. Opperman*, 79 Cal. 468; *Barber v. Babel*, 36 Cal. 14.)

Therefore the husband should have been joined as a party plaintiff. (Code Civ. Proc., secs. 370, 372, 378; Pomeroy's Code Remedies, sec. 349.) Plaintiff is estopped by her signature to the agreement against alienation to question its validity. (Hermann on Estoppel, sec. 10; Civ. Code, secs. 767, 1660; 1 Parson on Contracts, 11.) As the restraint against alienation was not to extend beyond the life of Mary Jane Stanley, the agreement was valid, and vested a life estate in her with the remainder over to plaintiff and W. H. Stanley. (Civ. Code, secs. 715, 716, 767, 740-42; *Chandler v. Chandler*, 55 Cal. 269.) The provision in the contract making W. H. Stanley manager and superintendent, with the power to look after the property and rent it, made him the trustee of Mary Jane Stanley. (*Colton v. Colton*, 127 U. S. 300; *Tobias v. Ketchum*, 32 N. Y. 319; *Scott v. West*, 63 Wis. 529, 560; Bolles on Suspension of Alienation, secs. 53, 54; Perry on Trusts, secs. 82, 151, 158; *Cresswell v. Jones*, 68 Ala. 420.)

*Shadburne & Herrin*, for Respondent.

A married woman may sue alone when the action concerns her separate property, or her right or claim to the homestead property. (Code Civ. Proc., sec. 370.) The filing of a declaration of homestead on the premises did not vest any title in the husband, nor create a new estate. (Civ. Code, sec. 1265; *Gee v. Moore*, 14 Cal. 477; *Tyrrell v. Baldwin*, 78 Cal. 475; *Neary v. Godfrey*, 102 Cal. 343; Freeman on Cotenancy, c. 3; *Mauldin v. Cox*, 67 Cal. 391.) Where there is a gift no trust is created. (Perry on Trusts, sec. 119; *Tryon v. Huntoon*, 67 Cal. 325; *Sears v. Cunningham*, 122 Mass. 538; *Barrett v. Marsh*, 126 Mass. 213; *Paisley's Appeal*, 70 Pa. St. 158; *Hess v. Singler*, 114 Mass. 56.) No condition or conditional limitation against alienation is good. (Civ. Code, sec. 711; *Murray v. Green*, 64 Cal. 363; *Reifsnyder v. Hunter*, 19 Pa. St. 41; *Walker v. Vincent*, 19 Pa. St. 369; *Ludlow v. New York etc. R. R. Co.*, 12 Barb. 440; *Kepple's Appeal*, 53 Pa. St. 211; *De Peyster v. Michael*, 6 N. Y.

492; 57 Am. Dec. 470; *McDowell v. Brown*, 21 Mo. 57; 6 Am. & Eng. Ency. of Law, 877.)

BRITT, C.—Action to quiet title to a parcel of land in the city and county of San Francisco. Plaintiff is the wife of one Oscar Prey; defendant is her brother; she claims title through Mary J. Stanley, the mother of herself and defendant, in virtue of a deed of the premises executed to her by said Mary J. Stanley, February 29, 1892, in consideration of love and affection. Judgment was for plaintiff.

1. On November 29, 1892, plaintiff filed in the recorder's office a declaration of homestead on the premises for the joint benefit of herself and her said husband; this action was begun June 15, 1893; it is alleged in the complaint that the land in question is plaintiff's separate property. Appellant maintains that there is a defect of parties in that said Oscar Prey should have been joined with his wife as a plaintiff (Code Civ. Proc., sec. 370); the ground assigned for this view is that upon the declaration of the homestead the land ceased to be her separate property and became the joint property of herself and her husband. Conceding, for present purposes only, that the declaration of homestead transmuted the title into a joint tenancy, as claimed by appellant, it is yet not perceived that the result contended for would follow; whatever interest the wife has in the land was acquired by gift, and is, therefore, her separate property (Civ. Code, sec. 162); for the enforcement or protection of such right, even if that of a joint tenant only, she is now permitted to sue alone (Code Civ. Proc., secs. 370, 384); and as against one having no interest in the land her right for the purposes of this action extends to the whole thereof. The husband was not a necessary party.

2. On January 25, 1892, one Murphy conveyed certain land, including that in suit, to said Mary J. Stanley, in consideration of the sum of two thousand five hundred dollars, which was paid by the defendant, W.

H. Stanley; the transaction being intended as a gift from the latter to his mother. Thereafter, on February 23, 1892, a contract in writing was executed, naming as the parties thereto said Mary J. Stanley and W. H. Stanley, and reciting such acquisition of the land by her, and that the purchase money for the same was furnished as a gift by said W. H. Stanley. It then set forth a covenant on the part of said Mary J. that no part of such land "shall be sold or conveyed . . . without the consent" of said W. H. Stanley; that he was to be known and considered as the manager and superintendent of the land described for the interest and benefit of said Mary J., to whom was to be paid all the income thereof; and that, in case of her death, the property should be divided between her lawful heirs, "who are now at this time Sarah Prey and W. H. Stanley." This instrument was signed by the plaintiff as well as by Mary J. and W. H. Stanley, though plaintiff was not named a party in the body thereof. Mary J. Stanley made the deed of February 29, 1892, to the plaintiff without defendant's consent.

It is argued that the contract of February 23d operated to make W. H. Stanley a trustee of the title for his mother, but there is nothing in its language to warrant this contention; to say that he should be manager and superintendent for her benefit, no more made him a trustee having an interest as such in the land, than if he had been named her steward, collector, or attorney. The question, then, is, whether the agreement of Mary J. Stanley, not to convey the land without her son's consent, was valid; if it was, plaintiff has no title; if it was not, her title is clear as against defendant. Conditions in restraint of alienation, when repugnant to an interest created in property, are void. (Civ. Code, sec. 711.) In consonance with this principle, it was held in *Murray v. Green*, 64 Cal. 363, that a clause in a deed restraining the grantee from conveying without the grantor's consent, the title granted being the fee, was repugnant to the interest created by the deed, and void.

In the present case, the restriction is not contained as a condition in the instrument by which the estate passed to Mary J. Stanley, but occurs in the form of a covenant on her part in a separate contract, which, as appears from its recitals, was intended to operate as a qualification of the absolute conveyance from Murphy to her. But the rule does not depend upon the mere form in which the restraint is imposed. It avoids, as well, covenants of the grantee against alienation as conditions of like nature imposed by the grantor; such covenants, if not within the letter of section 711 of the Civil Code, are yet obnoxious to the policy of which that section is a partial expression. (Greenhood on Public Policy, 606, note 2, et seq.; *Hunt v. Wright*, 47 N. H. 400; 93 Am. Dec. 451, and cases cited.) The parties to the contract of February 23, 1892, seem to have made the mistake of leaving the absolute title in Mrs. Stanley, and at the same time attempting to destroy an inseparable incident of such title. They could not thus create a mongrel estate unknown to the law, and the attempt was abortive. (*Murray v. Green*, 64 Cal. 367; *Doebler's Appeal*, 64 Pa. St. 9; *Mandlebaum v. McDonell*, 29 Mich. 92; 18 Am. Rep. 61.)

It follows, also, that the claim of appellant that plaintiff is estopped, by reason of her signature, to the contract of February 23, 1892, cannot be sustained; the restraint sought to be imposed on Mary J. Stanley's power of alienation being void; as against the policy of the law, the plaintiff's assent thereto could not estop her to allege its invalidity. (Greenhood on Public Policy, 115; 2 Parsons on Contracts, 789, note 4.) No other points made require special notice.

The judgment and order appealed from should be affirmed.

BELCHER, C., and HAYNES, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

McFARLAND, J., HENSHAW, J., TEMPLE, J.

Hearing in Bank denied.

BEATTY, C. J., dissented from the order denying a hearing in Bank.

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[No. 15950. Department Two.—December 13, 1895.]

SECONDO GILETTI, RESPONDENT, v. CARLO SARACCO, APPELLANT.

**ACTION UPON NOTES—DENIAL OF CONSIDERATION—PLEA OF SPECIAL AGREEMENTS—FINDINGS.**—In an action upon several promissory notes, where the court finds that they were executed by the defendant in consideration of a loan by plaintiff to the defendant, and that no part of the principal or interest due on the notes has been paid, the findings sufficiently cover issues raised by the answer as to want of consideration of the notes, and by plea of special agreements to the effect that, as to one of them, he was not to be obliged to pay it until he should be able, and that, as to another, it was given with the understanding that a joint maker with him was the person that was to pay that note.

**ID.—FAILURE TO FIND UPON ISSUES—WANT OF EVIDENCE.**—A failure to find upon issues, a finding upon which would merely have the effect of invalidating a judgment fully supported by the findings made, will not be held ground for reversal, where it is not shown by statement or bill of exceptions that evidence was submitted in relation to such issues.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. JAMES M. TROUTT, Judge.

The facts are stated in the opinion of the court.

*Henry E. Highton*, for Appellant.

As between the parties to a promissory note or acknowledgment of indebtedness, the consideration of the note or acknowledgment, and any equities between the parties arising out of the execution of the note or acknowledgment, may be inquired into; and, if there is no consideration, the payee cannot recover against the maker. (*Fisher v. Salmon*, 1 Cal. 413; 54 Am. Dec. 297; *Cohen v. Goux*, 48 Cal. 97; *Brady v. Henry*, 71 Cal. 481; 60 Am. Rep. 543; *McCroskey v. Ladd*, 96 Cal. 455;

*Risley v. Gray*, 98 Cal. 40.) The failure of the court to find on the issues raised by the answer necessitates a reversal of the judgment. (*Billings v. Everett*, 52 Cal. 661, 663; *Swift v. Canavan*, 52 Cal. 417, 419; *Taylor v. Reynolds*, 53 Cal. 687, 689; *Ball v. Kehl*, 95 Cal. 606, 614.) The statements in the answer in reference to the obligations sued upon in the various counts of the complaint were not affirmative matter which was required to be affirmatively proved by the defendant, but were, in effect, merely denials of facts required to be proved by the plaintiff, in order to maintain his action. (*Bridges v. Paige*, 13 Cal. 640-42; *Goddard v. Fulton*, 21 Cal. 430, 435, 436; *Landis v. Morrissey*, 69 Cal. 83; *Kennedy v. Berry*, 52 Cal. 88; Angell on Limitations, 6th ed., secs. 235, 236; Wood on Limitations of Actions, 186, note 7; 2 Wharton on Evidence, 3d ed., sec. 1060.)

*Francis A. Rossi*, for Respondent.

An issue raised by a defense upon which no evidence is offered at the trial and no finding made is deemed immaterial, and the judgment will not be reversed for want of a finding. (*Senter v. Senter*, 70 Cal. 619; *Himmelman v. Henry*, 84 Cal. 104; *Rogers v. Duff*, 97 Cal. 66; *Gregory v. Gregory*, 102 Cal. 52; *Demartin v. Demartin*, 85 Cal. 75; *Wise v. Burton*, 73 Cal. 174; *Commissioners v. Barnard*, 98 Cal. 201.) As the facts found support the judgment, the failure of the court to find on any issue not necessary to support the judgment cannot be considered on the appeal from the judgment. (*Southern Pac. R. R. Co. v. Dufour*, 95 Cal. 621; *Roberts v. Bell*, Cal., Dec. 31, 1895.)

MCFARLAND, J.—This is an appeal by defendant upon the judgment-roll alone from a judgment in favor of plaintiff.

The action was upon three certain written obligations in the nature of promissory notes, for the payment of money, made by appellant to respondent, payable to the latter on demand, and delivered to him by appellant.

In the answer the execution by appellant of the said obligations is not denied; but it is averred that as to one of the obligations appellant was, by agreement, not to be obliged to pay the same until he "should be able to pay the same," and that it is not due—although he does not deny that he is not able to pay it. As to another of the obligations it is averred that respondent could have recovered the amount of it from one Vandagna, who signed it jointly with appellant, but that respondent never demanded payment of said Vandagna; that appellant has no knowledge of said obligation; "and that if defendant's name is signed to said note he never received any consideration therefor, and denies the same or any part thereof." As to the third obligation it is averred that it "was given with the understanding that Giovanne Vandagna was the person who had to pay said note," that he was able to pay it, and that respondent had not demanded payment of said Vandagna. There is also a general denial that the obligations were due or payable from appellant to respondent. And the only point made for a reversal is that the court did not find upon these averments in the answer.

The court found that each of these obligations—called by court and counsel promissory notes—was executed by appellant to respondent and delivered to him on the respective days alleged in the complaint; that they were executed in consideration of a certain named sum of money, United States gold coin, "loaned by plaintiff to defendant at the respective dates thereof," and "that no part of the principal or interest due on said promissory notes has ever been paid, but that the whole thereof remains now due, owing, and unpaid."

Assuming that these matters set up in the answer constitute a defense at all, then if they were not affirmative matter, but merely denials, as counsel for appellant seems to regard them in his final brief, they are fully covered by the findings. But under any view of their character, as appellant introduced no evidence to support them, and as the findings are sufficient to sup-



port the judgment, no finding in relation to them was necessary; for "a failure to find upon some issue, a finding upon which would merely have the effect of invalidating a judgment fully supported by the findings made, will not be held ground for reversal, unless it is shown by statement or bill of exceptions that evidence was submitted in relation to such issue." (*Himmelman v. Henry*, 84 Cal. 104.)

The judgment is affirmed.

HENSHAW, J., and TEMPLE, J., concurred.

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[No. 16002. Department Two.—December 14, 1895.]

**WESTERN GRANITE AND MARBLE COMPANY,  
RESPONDENT, v. M. F. SOUC, APPELLANT.**

**AGENCY—AUTHORITY OF AGENT—CONTRACT FOR GRANITE COPING—CHANGE OF SPECIFICATIONS.**—Where an agent was authorized to have a granite coping constructed around a cemetery lot of the principal, of the same quality of material as that of the coping around another lot, and the work was done like the other coping, and of the same quality of material, and the principal expressed satisfaction with it before it was completed, it is immaterial that the agent named a different kind of granite in the plans and specifications for the coping, and afterward assented to the change of the contract to the same kind of rock as that used in the other coping.

**APPEAL** from a judgment of the Superior Court of Santa Clara County. JOHN REYNOLDS, Judge.

The facts are stated in the opinion of the court.

*Bull & Cleary*, and A. W. Crandall, for Appellant.

D. W. Burchard, for Respondent.

**McFARLAND, J.**—This is an action to recover four hundred and seventy dollars, the alleged price agreed to be paid by defendant to plaintiff for the construction by the latter of a granite coping around the burial lot of the former. The jury rendered a verdict in favor

of plaintiff for said amount of money, for which judgment was entered. Defendant appeals.

We do not think it necessary to notice separately the various rulings and instructions of the court, for the errors assigned all turn upon one proposition of appellant which cannot be maintained; namely, that the scope of the agency of the appellant's agent, Lenzen, extended only to the drawing of the plans and specifications for the coping, making a contract in accordance therewith, and seeing that such contract was complied with. The evidence shows that there was coping in the cemetery around a lot of one Cooney which pleased the appellant, and that she authorized Lenzen to have one constructed around her lot similar to and of the same quality of material as the Cooney coping. In order to get bids for the work Lenzen prepared a "sketch" of some "kind of specifications" upon which the contractors bid. The respondent was the lowest bidder for four hundred and seventy dollars, of which bid appellant was informed, and with which she was satisfied. That was in May, and she said that she was not in a hurry to have the work done, but two or three months afterward she told him to have the work done, saying to him, "You go on and do as you would for yourself." The work was done, and the coping was like the Cooney coping, and of the same quality of material, and she saw it just before it was completed and expressed herself satisfied. Her subsequent refusal to pay for it seems to have been the result of a suggestion of a discharged employee of respondent; and the only objection then made to the sufficiency of the work that needs notice was that the rock used was not what is called "Penryn" granite. When Lenzen drew up his sketch of specifications for the convenience of bidders he erroneously supposed that Penryn granite had been used in the Cooney coping, and he therefore put Penryn into that sketch. The contract with the respondent was a verbal contract, by which respondent was to "duplicate the Cooney job." The Cooney coping was made of rock

called "Loomis" granite, and respondent informed Lenzen that he would use the Loomis rock, and Lenzen agreed to it. The evidence shows that there is no special difference between the Penryn and the Loomis granite, both being on the same ledge. Moreover, the appellant, as her own witness testifies, was told that the stone used in her coping was not Penryn before it was set up. At all events, even assuming that the sketch of specifications and the bid thereon was a contract, and that the use of the rock called Loomis was not a compliance with it, we are satisfied, from the evidence, that Lenzen had full authority from appellant to make or change any contract, provided he kept in view the construction of a coping similar to and of the same quality of material as the said Cooney coping.

The judgment and order denying a motion for a new trial are affirmed.

HENSHAW, J., and TEMPLE, J., concurred.

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[No. 15769. In Bank.—December 14, 1895.]

GILBERT L. CURTISS, APPELLANT, v. N. S. BACHMAN ET AL., RESPONDENTS.

**INJUNCTION—ACTION ON BOND—COUNSEL FEES AND EXPENSES OF SUIT.**

The liability of the sureties upon an injunction bond is measured by the terms of their contract; and where the damages are limited by the terms of the bond to such as the plaintiff may sustain by reason of the injunction, whatever expenses he is subjected to by reason of the suit, or for counsel fees in defending the suit, are not damages within the terms of the bond.

**ID.—COUNSEL FEES, WHEN ALLOWED.**—Counsel fees incurred by defendant by reason of a preliminary injunction are part of the damages for which he has a right to indemnity; but only such counsel fees as may be incurred after the injunction has been issued, and prior to the determination of the action, can be considered as within the rule, and services of counsel rendered in the trial of the cause are not a portion of the damages sustained by reason of the injunction.

**ID.—SERVICES OF COUNSEL BEFORE ISSUANCE OF INJUNCTION.**—Services of counsel employed to resist a motion for an injunction rendered by virtue of an order to show cause why the injunction should

not be granted, are not rendered by reason of the injunction, and cannot be recovered in an action upon the injunction bond.

**ID.—UNSUCCESSFUL MOTION TO DISSOLVE AN INJUNCTION.**—An unsuccessful motion to dissolve an injunction does not authorize a recovery for the expense of counsel fees in making the motion, unless the court suspends its decision on the motion until the hearing of the case.

**ID.—PRELIMINARY INJUNCTION—EFFECT OF FAILURE TO SUSTAIN ACTION—WAIVER OF DAMAGES.**—It does not follow that because the plaintiff failed to sustain his action at the trial a preliminary injunction was not properly issued; and if, instead of seeking a dissolution of the preliminary injunction, the defendant prefers to defeat the plaintiff in his action, he waives his right to recover from the sureties any damages that he may sustain by reason of the issuance of the preliminary injunction.

**ID.—COSTS.**—Costs incurred upon the trial of the action, and upon appeal from the judgment are not within the terms of an injunction bond given for a preliminary injunction.

**ID.—LOSS OF TIME—INJURY TO BUSINESS.**—The loss of defendant's time and the injury to his business resulting from the litigation are outside of the undertaking of the sureties upon the injunction bond.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. **EUGENE R. GARBER**, Judge.

The facts are stated in the opinion of the court.

*Charles F. Hanlon*, for Appellant.

All damages to which a party may be put by the wrongful issuance of an injunction should be recoverable in an action upon the undertaking, and reasonable counsel fees should be included in those damages. (*Ah Thaie v. Quan Wan*, 3 Cal. 216.) Counsel fees for procuring the dissolution of, and defending against, the injunction, are recoverable. (*Prader v. Grim*, 13 Cal. 585; *Summers v. Farish*, 10 Cal. 347-53; *Heyman v. Landers*, 12 Cal. 111; *Porter v. Hopkins*, 63 Cal. 54; *Ryan v. Anderson*, 25 Ill. 372; *Edwards v. Bodine*, 11 Paige, 224, cited and approved in *Ah Thaie v. Quan Wan*, *supra*; *Derry Bank v. Heath*, 45 N. H. 525; *Corcoran v. Judson*, 24 N. Y. 107; 2 High on Injunctions, 2d ed., sec. 1685.) Any damage to his business or otherwise necessarily resulting from it may be recovered by plaintiff. (*Hovey v. Rubber-Tip Pencil Co.*, 50 N. Y. 335; *Summers v. Farish*, *supra*; *Asevado v. Orr*, 100 Cal. 299; *Rice v.*

*Cook*, 92 Cal. 144, 150; 2 Sedgwick on Damages, 5th ed., 488; *Dougherty v. Dore*, 63 Cal. 170; *Lambert v. Haskell*, 80 Cal. 618.) All items of expense allowable as damages, up to the final dissolution of the injunction, can be recovered, whether it was finally dissolved on motion or upon the trial. (*Langworthy v. McKelvey*, 25 Iowa, 52; *Newton v. Russell*, 24 Hun. 40; *Clark v. Clayton*, 61 Cal. 634; *Dougherty v. Dore*, *supra*; 11 High on Injunctions, 2d ed., sec. 1649.)

**W. B. Sharp, for Respondents.**

Counsel fees cannot be recovered, as the denial of the motion to dissolve the injunction shows that they were not necessarily expended. (*Bustamente v. Stewart*, 55 Cal. 116; *Porter v. Hopkins*, 63 Cal. 53; *Carter v. Mulrein*, 82 Cal. 167; 16 Am. St. Rep. 99; *Mitchell v. Hawley*, 79 Cal. 301; *Lambert v. Haskell*, 80 Cal. 611; *Hooper v. Patterson* (Cal., Feb. 25, 1893), 32 Pac. Rep. 514.) The injunction did not interfere with plaintiff's business, and the consequential damages attempted to be proved as to what his business suffered, and the expenses of plaintiff in hotel bills and traveling expenses, which are taxable costs, are too remote to be recovered on the injunction bond. (*Edwards v. Bodine*, 11 Paige, 224. See, also, *Willson v. McEvoy*, 25 Cal. 170; *Elder v. Kutner*, 97 Cal. 493.)

HARRISON, J.—In an action brought in the superior court of San Francisco against the appellant by one Nettie Gilman, a preliminary injunction was issued by the court, and the respondents herein were the sureties in an undertaking given on her behalf upon the issuing of said injunction. The condition of the undertaking is: "In case said injunction shall issue and remain in full force and effect, the said plaintiff will pay to the said parties enjoined such damages, not exceeding the sum of five thousand dollars, as such parties may by reason of the said injunction sustain, if said superior court finally decide that the said plaintiff was not en-

titled thereto." The present action was brought to recover from the respondents the damage sustained by reason of the issuance of the said injunction. Upon a former appeal in this cause (*Curtiss v. Bachman*, 84 Cal. 216) a judgment that had been rendered in favor of the plaintiff was reversed, with directions to sustain the defendant's demurrer to the complaint. Upon the going down of the *remittitur* the plaintiff amended his complaint, and the cause was tried by the court without a jury, who found that the plaintiff had not sustained any damage by reason of the issuance or continuance of the injunction, and rendered judgment for the defendants. The plaintiff moved for a new trial upon the ground that this finding was not sustained by the evidence, and upon the denial of his motion has appealed therefrom, and also from the judgment.

The action of *Gilman v. Curtis*, 66 Cal. 116, was for the purpose of determining the ownership of a certain policy of life insurance, and was commenced March 26, 1880. On the next day the court granted a restraining order by which the plaintiff herein was enjoined from collecting the money due upon the policy, and from transferring or delivering the policy, or the money due thereon, to any other person, and was directed to show cause on a succeeding day why the order should not be continued in full force until the final judgment and decree in the case. An undertaking in the sum of five hundred dollars was executed by the respondents herein upon the issuance of the said restraining order. On April 16th this order to show cause came on for hearing, and the court on that day ordered that the said restraining order be continued in full force and effect until the termination of the suit. Subsequently the defendant, appellant herein, moved to dissolve the injunction, and on July 30th his motion was denied. On the same day the court ordered that the plaintiff file a bond in the sum of five thousand dollars, and thereupon the undertaking sued on herein was executed by the sureties to the original undertaking. The cause was tried in April, 1881, and

judgment rendered in favor of the plaintiff. That judgment was afterward reversed by this court (*Gilman v. Curtis, supra*), and upon a new trial a judgment was rendered by the court dismissing the action.

The damages for which the plaintiff seeks to recover herein, and of which he gave evidence at the trial, consisted of moneys which he had paid to his attorneys, the costs incurred in the action of *Gilman v. Curtis, supra*, and the loss of time and injury to his business necessitated by the suit. We are of the opinion, however, that neither of these elements of damage is within the terms of the obligation of the defendants, and that the plaintiff failed to establish any right of action against them. The liability of the defendants is measured by the terms of their contract, and in the present action is limited to the damages that the plaintiff might sustain "by reason of the said injunction." Whatever expenses he was subjected to by reason of the suit, as distinguished from those sustained by reason of the injunction, are not damages within this contract of the defendants; and, as it rested upon the plaintiff to establish a cause of action against them, it was necessary for him to show, not only that he had sustained damage, but that the damage which he had sustained was caused solely by reason of the injunction.

Counsel fees incurred by a defendant by reason of a preliminary injunction are recognized as a part of the damages for which he has a right to indemnity, and are within the undertaking which the plaintiff is required to give as a condition of procuring the injunction; but only such counsel fees as may be incurred after the injunction has been issued, and prior to the determination of the action, can be considered as within the rule. If the defendant, instead of attempting to remove the temporary injunction, seeks rather to prevent the issuance of a permanent injunction, or directs his efforts to defeating the action of the plaintiff, the expense of counsel fees thus incurred is an incident of the suit, and is not recoverable as damages sustained by reason

of the injunction. "The allowance of counsel fees in suits on injunction bonds is exceptional, and should not be carried beyond the point to which former decisions have taken it" (*Mitchell v. Hawley*, 79 Cal. 301; *San Diego Water Co. v. Steamship Co.*, 101 Cal. 216.) Counsel fees rendered in resisting a motion for a preliminary injunction are not within the terms of the undertaking, since they are not expenses made necessary "by reason of the injunction." (*Sweet v. Mowry*, 71 Hun, 381; *Whiteside v. Noyac Cottage Assn.*, 84 Hun, 555), but are expenses incurred in the action as much as are counsel fees rendered in attempting to prevent the issuance of a permanent injunction (*Thurston v. Haskell*, 81 Me. 303); and an unsuccessful motion to dissolve an injunction does not authorize a recovery for the expense of counsel fees in making the motion. (*Langdon v. Gray*, 22 Hun, 511; *Randall v. Carpenter*, 88 N. Y. 293.) An exception to this rule is recognized when the court itself suspends its decision upon the motion until the hearing of the cause. (*Andrews v. Glenville Woolen Co.*, 50 N. Y. 282.)

The counsel fees of which evidence was offered at the trial herein, other than those rendered in preparation for the trial or in defense of the action, were those rendered for the plaintiff upon the order to show cause why the restraining order should not be continued until the termination of the suit, and those rendered upon a subsequent unsuccessful motion on his part to dissolve the injunction. It is well settled that the services of counsel rendered in the trial of the cause are not a portion of the damage sustained by reason of the injunction. (*Bustamente v. Stewart*, 55 Cal. 115.) When the plaintiff at the commencement of the action applied for the injunction, the court deemed it proper that the defendant should be heard before granting the writ, and made an order to that effect. Upon this application the judge was authorized to restrain the defendant "in the mean time." (Code Civ. Proc., sec. 530.) The provision in the order restraining the defendant "until the



further order of the court" had no other meaning than "in the mean time," or until the decision upon the order to show cause. (*Sweet v. Mowry, supra.*) When this order to show cause was made upon the defendant, it was at his option to appear upon the day fixed for the hearing and resist the motion at that time, or to allow an injunction *pendente lite* to be granted, and seek at the trial to defeat a recovery by the plaintiff, and prevent a permanent injunction. The services of counsel that were employed by him to resist the motion were rendered by virtue of the order to show cause why the injunction should not be granted, and not by reason of the injunction. (*Sweet v. Mowry, supra.*) The restraining order made at the commencement of the action would expire by its own terms at the hearing of this motion, and, although it was then continued until the termination of the suit, the order so continuing it was in fact a new and distinct restraint, and itself constituted the preliminary injunction asked by the plaintiff (*San Diego Water Co. v. Steamship Co., supra*), and for which the undertaking sued on was given.

It is not shown by the record upon what grounds the subsequent motion to dissolve the injunction was made, or was denied by the court, but, as the preliminary injunction was granted upon notice to the defendant, and after hearing thereon, the proper course for the defendant to take was to appeal from the order (*Natoma etc. Min. Co. v. Parker*, 16 Cal. 83), and the court in all probability denied the motion upon the ground that the defendant was not authorized to make it. "Costs and counsel fees on a successful motion to dissolve an injunction are considered the natural consequences of its existence, and are properly damages, but there is no reason why the party obtaining the injunction should pay the expenses of ill-directed experiments to get rid of it. To allow such a charge would be a premium for the employment of unskillful counsel." (*Childs v. Lyons*, 3 Robt. 704.) Especially is this rule applicable if the services were rendered upon a motion unauthorized

either in practice or by statute. It does not follow that because the plaintiff failed to sustain his action at the trial the preliminary injunction was not properly issued. It is one of the provisional remedies authorized by the Code of Civil Procedure, and the right of a party to such remedy is the same as is the right to a permanent injunction; but, if he is to be mulcted in damages for every unsuccessful attempt to secure its dissolution, the privilege would be a barren one. If the plaintiff obtains an injunction *ex parte*, and before the hearing of the cause the defendant can secure its dissolution, either by reason of a defect in the original application, or upon a counter showing on his part, he thereby obtains a decision of the court that the plaintiff was not entitled to this provisional remedy, even as a matter of discretion (see *Hicks v. Michael*, 15 Cal. 107); but if, instead of seeking such decision of the court, he prefers to defeat the plaintiff in the action, he waives his right to recover from the sureties any damages that he may sustain by reason of its issuance.

It does not appear that any portion of the expenses contained in the cost bills offered in evidence was incurred except upon the trial of the action; and the costs incurred upon the appeal, and subsequent to the rendition of the judgment in the superior court, are not within the terms of the undertaking. (*Lambert v. Haskell*, 80 Cal. 611.) The loss of time and injury to the business of the appellant were clearly outside of the undertaking of the sureties.

Certain exceptions to rulings excluding evidence were taken by the appellant, but, as the evidence offered related only to such damages as were not recoverable from the respondents, the exclusion was proper.

The judgment and order are affirmed.

GAROUTTE, J., VAN FLEET, J., BEATTY, C. J., HENSHAW, J., and TEMPLE, J., concurred.

McFARLAND, J., dissented.

[S. F. No. 75. Department Two.—December 16, 1895.]

**CHARLES RICHARDSON, APPELLANT, v. CITY OF EUREKA, RESPONDENT.**

**NUISANCE—OBSTRUCTION OF WATERCOURSE—INJUNCTION—FORMER ADJUDICATION—RECOVERY OF DAMAGES—INJURIES NOT ADJUDICATED.**

In an action to enjoin the continuance of a nuisance caused by the obstruction of a watercourse in which the complainant alleges injury to the plaintiff's land and buildings, a former judgment for the recovery of damages caused by the obstruction of the same watercourse, the record of which does not disclose that injury was caused to the plaintiff's buildings, or to the rental value of his premises, is not conclusive as to such injury; and it is open for the defendant to show that the injuries to the building complained of were the result of defects in its construction, or of its situation, uninfluenced by the nuisance created by the defendant; and a decision founded on evidence tending to prove those facts cannot be disturbed as being in conflict with the prior adjudication.

**ID.—RES ADJUDICATA—INFERENCE.**—The application of the doctrine of *res adjudicata* cannot be made by inference or surmise upon the effect of the judgment.

**ID.—STREET CULVERT—CONTINUANCE OF OBSTRUCTION—OFFER TO REDRESS INJURY—REFUSAL OF INJUNCTION.**—Where a city had obstructed a watercourse, by the erection of a culvert across a street, to the injury of the plaintiff, and had endeavored to redress the injury in a proper manner, but its efforts were thwarted by the conduct of the plaintiff in refusing to accept the offered remedy, an injunction was rightfully refused to prevent the wrong which was otherwise irremediable.

**ID.—EQUITY CASE—FINDINGS ADVISORY—INSTRUCTIONS.**—An action to enjoin a nuisance is a case in equity, and the verdict of a jury in such a case is merely advisory to the court; and if instructions given to the jury are erroneous, such error is not ground for reversing the judgment, the correctness of the decision of the court, and not the propositions of law it laid down for the guidance of the jury, being the only question for determination upon appeal.

**ID.—EXPRESS FINDINGS—WAIVER—PRESUMPTION UPON APPEAL.**—Express findings by the court are necessary in an equity action, unless they are waived; but the absence of such findings in the record is not a fatal defect, unless it affirmatively appears that they were not waived.

**APPEAL** from a judgment of the Superior Court of the County of Humboldt and from an order denying a new trial. **G. W. HUNTER**, Judge.

The facts are stated in the opinion of the court.

*John W. Turner*, for Appellant.

The question of nuisance having been established by the former judgment, the court will grant an injunction.

as matter of course, where, as here, such nuisance is of a continuous or constantly recurring character. (*Hicks v. Davis*, 4 Cal. 67; *Paddock v. Somes*, 102 Mo. 226; Wood on Nuisances, 941-46, and cases cited; 3 Pomeroy's Equity Jurisprudence, secs. 1347-50; *Perry v. Fitzhowe*, 8 Ad. & E. 757; *Rhodes v. Dunbar*, 57 Pa. St. 274; 98 Am. Dec. 221; *Cleveland v. Citizens' Gas Light Co.*, 20 N. J. Eq. 201; *Corning v. Troy Iron etc. Factory*, 40 N. Y. 191; *Daubenspeck v. Gear*, 18 Cal. 443.) Plaintiff could not have avoided the injury by ordinary diligence, and he had no lawful remedy other than an injunction. (*Fraser v. Sears Union Water Co.*, 12 Cal. 558; 73 Am. Dec. 562.) Plaintiff's right being violated, there was an actionable nuisance, even though no actual damage was sustained. (*Ellis v. American Academy*, 120 Pa. St. 608; 6 Am. St. Rep. 739; *Moore v. Clear Lake etc.*, 68 Cal. 146; 6 Wait's Actions and Defenses, 282; *Ashby v. White*, 2 Ld. Raym. 938; *Fisher v. Clark*, 41 Barb. 327; Wood on Nuisances, 2d ed., 1012.) In suits in equity, the verdict of the jury is only advisory to the court. (*Sweetser v. Dobbins*, 65 Cal. 529.) As findings were not waived, the court ought to have made and filed them. (*Van Court v. Winterson*, 61 Cal. 616; *Sullivan v. Royer*, 72 Cal. 249; 1 Am. St. Rep. 51; *Bennett v. Pardini*, 63 Cal. 155; *Cummings v. Ross*, 90 Cal. 68; *Goldman v. Rogers*, 85 Cal. 574.)

A. J. Monroe, for Respondent.

In a second action between the same parties for a different demand, the first action operates as an estoppel only upon the matter actually at issue and determined in the original action, and not as to matters that might have been litigated therein. (*Cromwell v. County of Sacramento*, 94 U. S. 352; *Ferrea v. Chabot*, 63 Cal. 564, 570; *Lillis v. Emigrant Ditch Co.*, 95 Cal. 561.) In the absence of an affirmative showing that findings were not waived, it will be presumed that findings were filed to support the judgment. (*Mulcahy v. Glazier*, 51 Cal. 627; *Campbell v. Coburn*, 77 Cal. 37; *Goyhinech v. Goyhinech*, 80 Cal.

410; *In re Arguello*, 85 Cal. 153; *Gordon v. Donahue*, 79 Cal. 502; *Smith v. Lawrence*, 53 Cal. 34.)

**THE COURT.**—This action, begun January 6, 1894, is a sequel of the case between the same parties reported in 96 Cal. 443. In that case Richardson obtained a judgment, which was affirmed in this court, for damages accruing to him by reason of a nuisance consisting in the obstruction of a natural watercourse on his land, and caused by certain street improvements made under the direction of defendant. In this action plaintiff seeks to recover for damage caused by the alleged continued maintenance of the same nuisance, and an injunction to restrain the further continuance thereof. We are informed by the present record that in the said former action it was alleged by plaintiff, among other things, that he was the owner of a lot of land situated at the corner of Fourth and E streets in the city of Eureka, and of certain buildings thereon; that a natural waterway ran across said lot, by which a great quantity of surface water was collected, and that such water escaped through a culvert crossing said Fourth street in front of plaintiff's property; that in grading said streets adjacent to plaintiff's lot the defendant moved said culvert and negligently failed to replace the same with any means for the escape of such water. The record here discloses further that the answer in that case denied the existence of said natural waterway, "denied the creating of any nuisance, and denied any damage resulting therefrom"; and that judgment on the verdict of a jury was entered for plaintiff therein August 28, 1890, for one thousand dollars damages. Nothing more appears of the material issues made and determined there.

The complaint in the present action repeated substantially the allegations above mentioned of the former complaint, stated also that as a consequence of said nuisance the water was for two years next before the commencement of this suit confined upon plaintiff's land

and under the buildings thereon, rendering the same uninhabitable and causing various injuries thereto, such as the settling of the foundations, the cracking of the walls, etc., as well as preventing any income to plaintiff from the rents thereof; that the nuisance was continuing, threatening irreparable injury, etc. Issue was joined upon these averments.

The case was tried by a jury, and the judgment-roll in the first action was placed in evidence by plaintiff, together with the testimony of several witnesses concerning the alleged injuries; such testimony related almost entirely to a large building on the lowest part of plaintiff's lot at the corner of said streets, and there was no dispute that water stood under such building to the depth of sixteen inches and more. On the part of defendant there was evidence tending to prove that the building was constructed on marshy and boggy land, and would have settled of its own weight; that, by reason of embankments and drains made in said natural watercourse, no water has descended therein to plaintiff's property since the time of the trial of the first action, August 28, 1890, except such as collected from the half block including his lot; that the foundation of his building is so constructed as to form a water-tight bulkhead, rendering the escape of water therefrom impossible without cutting an orifice through such foundation; that in December, 1892, the city constructed a sewer in said Fourth street for the purpose of draining plaintiff's lot, and that upon inquiry being made to him as to where connection should be made with his premises he said "he wouldn't recognize that sewer at all, and didn't want to connect"; that about a year later the city attempted to connect such sewer with the pond under plaintiff's building by making an aperture through the foundation, when he forbade the work and said he would not have the foundation cut into, and that such sewer, if so connected, would drain his lot dry. Plaintiff's alleged reason for refusing a connection with the new sewer was that the same was not as

low as the former culvert. There was no evidence that any substantial injury to his property could result from such connection. No special issues were submitted to the jury, and a general verdict was returned for the defendant. Plaintiff then moved the court to "make and render its findings and decision in favor of the plaintiff, the verdict of the jury being contrary to the evidence and contrary to the instructions of the court." The motion was denied, and judgment was entered that plaintiff take nothing.

1. The former judgment established that a natural watercourse existed on plaintiff's premises, and that defendant obstructed the same to the nuisance of plaintiff; but, so far as can be discerned from the record here, it was not then determined that any injury was or would be caused thereby to plaintiff's buildings, or the rental value of his premises; and it is only by inference that we can conclude from that judgment that the water was dammed on his land at all; for anything appearing, the injury there may have arisen from giving the flowing water a new direction—cutting away plaintiff's land or carrying off his buildings. Application of the doctrine of *res judicata* cannot be made by inference or surmise upon the effect of a judgment. (Code Civ. Proc., sec. 1911; *Lillis v. Emigrant Ditch Co.*, 95 Cal. 553.) Suppose plaintiff had sued the city for damage arising from the destruction of his building, it would be preposterous to say that the defendant could not prove that it was destroyed by fire, if such was the fact, merely because he had established, in a former action, the creation by the city of a nuisance which *might* have destroyed the building by the agency of water. So we think it was open to defendant to show that the injuries complained of in this case were the result of defects in the construction of the building, or of its situation, uninfluenced by the nuisance created by defendant; and the decision founded on evidence tending to prove those facts cannot be disturbed as being in conflict with the prior adjudication.

2. It is claimed, however, that the nuisance found by the verdict of August 28, 1890, being shown yet to exist, the plaintiff was entitled to an injunction against its continuance. But, admitting that the watercourse was still obstructed by reason of defendant's acts and omissions, yet the evidence tended strongly to show that the city had endeavored, in a proper manner, to redress the injury, and that its efforts were thwarted by the conduct of plaintiff. Injunctions issue to prevent wrongs otherwise irremediable; here the remedy seems to have been plain, speedy, adequate, and proffered to plaintiff, and no sufficient reason appears why he did not accept it. Under such circumstances an injunction is rightly refused.

3. The case was in equity. (*Sullivan v. Royer*, 72 Cal. 248; 1 Am. St. Rep. 51.) The verdict of the jury was merely advisory to the court, and if the instructions given to the jury were erroneous in any particular, as appellant insists they were, such error is not ground for reversing the judgment. The correctness of the decision of the court, and not the propositions of law it laid down for the guidance of the jury, is the question for determination in such instances. (*Schneider v. Brown*, 85 Cal. 205; *Sullivan v. Royer*, *supra*; *Sweetser v. Dobbins*, 65 Cal. 529; compare *Lamb v. Harbaugh*, 105 Cal. 692.)

4. Express findings by the court, however, were necessary, unless they were waived. (*Brandt v. Wheaton*, 52 Cal. 430; *McLaughlin v. Del Re*, 64 Cal. 472.) But absence of such findings in the record is not a fatal defect, unless it affirmatively appears that they were not waived. (*Campbell v. Coburn*, 77 Cal. 36.) We think there is no such affirmative showing here. The plaintiff moved the court to disregard the verdict, and render its findings and decision in favor of the plaintiff. This was not a request for findings generally, but for findings of specified import, viz., in favor of plaintiff, and was not such a motion as counsel was authorized to make (*Edgar v. Stevenson*, 70 Cal. 286, and cases cited);



*non constat* that there was not a waiver of findings differing from those asked for.

The judgment and order are affirmed.

Hearing in Bank denied.

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[S. F. No. 56. In Bank.—December 16, 1895.]

**THE PEOPLE EX REL. STEWART MENZIES, APPELLANT, v. M. A. GUNST, RESPONDENT.**

**POLICE COMMISSIONERS OF SAN FRANCISCO—APPOINTMENT AND REMOVAL—POWER OF GOVERNOR.**—No term of office of police commissioner was fixed by the act of April 1, 1878, known as the McCoppin act, and no authority was given to the appointing power after making the appointments except to fill vacancies; and the governor cannot appoint a police commissioner in the absence of a vacancy, or create and fill a vacancy by removing an incumbent, and appointing one to succeed him.

**ID.—CASE AFFIRMED.**—The case of *People ex rel. Hinton v. Hammond*, 66 Cal. 655, affirmed.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. A. A. SANDERSON, Judge.

The facts are stated in the opinion of the court.

*Clements, Cannon, Kline & Stradley*, for Appellants.

As the power possessed by the district judges under the old constitution of appointing police commissioners was swept away by the new constitution, and as it was not expressly provided in whom that power should vest, the governor succeeded to it under sections 4 and 16 of article XX of the new constitution, and section 875 of the Political Code. The police commissioners are removable at the pleasure of the governor, as the tenure of office is not fixed by the act creating the office. (Const. 1879, art. XX, sec. 16; *People v. Hill*, 7 Cal. 97; *Smith v. Brown*, 59 Cal. 673; *People v. Perry*, 79 Cal. 105; *People v. Newman*, 96 Cal. 608; *Higgins v. Cole*, 100 Cal. 260; *People v. Edwards*, 93 Cal. 153; *Peo-*

ple v. Ashburner, 55 Cal. 517.) The doctrine of *stare decisis* cannot be invoked in this case for the reasons: 1. That the decision in *People v. Hammond*, 66 Cal. 655, is not the decision of the majority of the court, as no two justices agreed upon the reasons upon which it was supposed to be founded (*Hart v. Burnett*, 15 Cal. 608; *Morse v. Goold*, 11 N. Y. 285; 62 Am. Dec. 103); 2. That that decision was based on an erroneous assumption in assuming that section 8, article V, of the constitution, was the only section bearing upon the question at issue (*Donner v. Palmer*, 31 Cal. 500); 3. That where a decision has been rendered by the court involving the determination of rights growing out of a statute on a constitutional provision, and the court inadvertently overlooks or fails to have its attention called to such statute or constitutional provision, the doctrine of *stare decisis* cannot be invoked to prevent the court from a re-examination of the case with the statute or constitution before it (*Duff v. Fisher*, 15 Cal. 375); 4. Where constitutional provisions have been erroneously construed, the court will not hesitate to preserve the constitution from impairment caused by erroneous judicial construction (*People v. Lynch*, 51 Cal. 39; 21 Am. Rep. 677); 5. Even if property rights had become vested, and the decision in *People v. Hammond*, *supra*, relied upon to protect them, they should be sacrificed, rather than a valuable provision in the fundamental law be obliterated (*San Francisco v. Spring Valley Water Works*, 48 Cal. 493); 6. When a correction can be made without working more harm than good, it should be done (23 Am. & Eng. Ency. of Law, 26, and cases cited; *McFarland v. Pico*, 8 Cal. 631; *San Francisco v. Spring Valley Water Works*, *supra*; *Aud v. Magruder*, 10 Cal. 291).

*Rothchild & Ach, E. W. McKinstry, and E. R. Garber,*  
for Respondent.

The constitution of 1879, in abolishing the district courts, did not repeal by implication that portion of the act of 1878 relating to the appointment of police com-

missioners. That act was continued in force, and has never been repealed or amended. (*In re Stuart*, 53 Cal. 746; *Barton v. Kalloch*, 56 Cal. 95; *Banks v. Yolo County*, 104 Cal. 258; *Desmond v. Dunn*, 55 Cal. 242-44; *Wood v. Election Commrs.*, 58 Cal. 566; *Staude v. Election Commrs.*, 61 Cal. 318; *People v. Hammond*, 66 Cal. 655; Pol. Code, sec. 19; *People v. Clunie*, 70 Cal. 504; *San Francisco v. Kiernan*, 98 Cal. 614; *In re Guerrero*, 69 Cal. 88-92; *People v. Newman*, 96 Cal. 607; *People v. Edwards*, 93 Cal. 154.) Statutes of a general nature do not repeal by implication charters and special acts passed for the benefit of particular municipalities. (1 Dillon on Municipal Corporations, 2d ed., sec. 54; *Walworth Co. v. Whitewater*, 17 Wis. 300; *Janesville v. Markoe*, 18 Wis. 350.) The police commission was not abolished by the constitution, although the appointing power had not been vested in any other person or body since the disorganization of the district courts. (*People v. Hammond*, *supra*.) All the points made by counsel in the present case were presented in *People v. Hammond*, *supra*, and the doctrine of *stare decisis* applies. A judgment rendered in an action is conclusive upon the questions involved in the action, and upon which it depends, or upon matters which, under the issues, might have been litigated and decided in the case, and the presumption of law is that such issues were actually heard and decided. (*Phelan v. Gardner*, 43 Cal. 306; *Parnell v. Hahn*, 61 Cal. 131; *Miles v. Caldwell*, 2 Wall. 35; Code Civ. Proc., sec. 1963, subd. 15; *Staude v. Election Commrs.*, *supra*; *Lenahan v. Tharp*, 8 Pac. Coast L. J. 960; *Heinlen v. Sullivan*, 64 Cal. 378; *Griffin v. Alsop*, 4 Cal. 406-9; *Giblin v. Jordan*, 6 Cal. 417, 418; *Clary v. Roland*, 24 Cal. 148-54; *Seale v. Mitchell*, 5 Cal. 401-03; *Davis v. Superior Court*, 63 Cal. 581; *People v. Freese*, 83 Cal. 454. *People v. Hammond*, *supra*, has been often affirmed, in the following cases: *People v. Pond*, 89 Cal. 143; *People v. Edwards*, *supra*; *People v. Newman*, *supra*; *People v. Ward*, 107 Cal. 236. There is no distinction between *People v. Hammond*, *supra*, and this case because of the

direct attempt made in this case to remove the respondent. Where an office is held during pleasure, the appointment of a successor is a removal of the incumbent. (Throop on Public Officers, sec. 350; *Commonwealth v. Slifer*, 25 Pa. St. 29; 64 Am. Dec. 680; *Keenan v. Perry*, 24 Tex. 253; *People v. Freese*, 76 Cal. 633-39; *Blake v. United States*, 103 U. S. 227.)

HENSHAW, J.—This is an action in *quo warranto* to test relator's title to the office of police commissioner of the city and county of San Francisco, against the claims of defendant thereto. Judgment passed for defendant, and plaintiff appeals.

The facts, about which there is no controversy, are that R. P. Hammond was a member of the original board of police commissioners of the city and county of San Francisco, appointed under the provisions of the act of the legislature approved April 1, 1878, and commonly known as the "McCoppin act."

Hammond continued in office until his death, which occurred in the year 1891. At and after the time of his death H. H. Markham was the governor of the state, and he appointed D. M. Burns to fill the vacancy thus arising.

Burns qualified, became, and acted as, a member of the board until January 5, 1895. Upon that day a vacancy occurred in the office by the resignation of said Burns. The governor, Markham, upon said last-named day appointed defendant Gunst to fill this vacant office.

Upon the seventh day of January Gunst qualified, and entered upon the discharge of his duties. Thereafter, on said day, the said Markham was succeeded as governor of the state by James H. Budd.

Upon January 13, 1895, Governor Budd gave notice in writing to the said police commission, and to the individual members thereof, including the defendant herein, that he had removed said defendant from office, and he likewise caused formal declaration of removal to be filed in the office of secretary of state.

Upon January 21, 1895, Governor Budd appointed relator herein police commissioner of the city and county of San Francisco, "vice M. A. Gunst removed." Menzies duly qualified, and upon Gunst's refusal to surrender the office this proceeding was instituted.

There is no distinction in principle between the contention of appellant in this case, and that made in *People v. Hammond*, 66 Cal. 655, and there is likewise no important distinction in fact. The main difference is that in the Hammond case Hinton was appointed to succeed Hammond, while here Menzies was appointed after the declared removal of Gunst. But as "the mere appointment of a successor would *per se* be a removal of the prior incumbent" (*Ex parte Hennen*, 13 Pet. 261; *Blake v. United States*, 103 U. S. 237), the distinction becomes immaterial.

But while the present case cannot be distinguished in principle from that of Hammond, it is earnestly insisted that the court erred in that decision and in others in which the interpretation of the Hammond case is adopted and followed. The claim made is that the governor has the power to remove and appoint the police commissioners at pleasure, and it is insisted that this claim finds support in sections 4 and 16 of article XX of the constitution, together with section 875 of the Political Code.

By the Hammond case it was decided that no term of office of police commissioner was fixed by the McCoppin act; that no authority was given to the appointing power after making the original appointments, except to fill vacancies, and that the governor could not appoint in the absence of a vacancy, or create and fill a vacancy by appointing some one to succeed an incumbent.

It cannot be assumed that the constitutional and code provisions upon which appellant relies were overlooked by the court in deciding that and kindred cases. An examination of their records discloses not only that they were cited in the briefs of counsel, and in the petition

for rehearing, but that the claim of the power of the governor to appoint at pleasure was strongly pressed upon the attention of the court.

But, as has been intimated, *People v. Hammond, supra*, is not a solitary case among the decisions of this court. It has formed the basis of other judicial determinations and its principles, both in Department and Bank have been repeatedly affirmed.

In *People v. Pond*, 89 Cal. 140, sections 4 and 16 of article XX of the constitution were cited to the court in Bank, and it is said:

"The questions argued by counsel for petitioners are not new. They may not have been presented so forcibly or with as great perspicuity before, but they have been determined adversely to the contentions of the petitioners, after careful consideration of the constitutional and statutory provisions germane to the subject, and we feel constrained to adhere to the construction heretofore adopted. The contention of petitioners, who claim to have been elected as members of the first board of supervisors, has been settled adversely to them by the decisions in *Desmond v. Dunn*, 55 Cal. 248, 249, and *People v. Board of Election Commrs.*, 2 West Coast Rep. 366, 3 Pac. Rep. 412, and the claim of the others by the decisions in *Staude v. Board of Election Commrs.*, 61 Cal. 313, *Heinlen v. Sullivan*, 64 Cal. 378, and *People v. Hammond, supra*. The effect which a decision overruling those cases would have upon municipal proceedings for over ten years past is so apparent that it is unnecessary for us to point out the reason why we should adhere to the decisions referred to—at least so far as the board of supervisors is concerned—even though we should believe that they were based upon an erroneous construction of the provisions involved. And, although the rule applies with less force to the case of the police commissioners, no good reason has been shown why the decisions heretofore rendered should be departed from. If the principle is wrong, or the system works unsatisfactorily, the remedy remains with the people."

In *People v. Edwards*, 93 Cal. 153, the power of the governor to appoint a fire commissioner was under consideration. The circumstances were substantially the same as in *People v. Hammond*, *supra*, the present constitution there, as in the Hammond case, having abolished the original appointing power. The court said:

"Questions involving the same principles as those under discussion were decided in *People v. Hammond*, *supra*. Under the act of April 1, 1878, the respondent in that case, and two others, were appointed by certain district court judges named in the act police commissioners for the city and county of San Francisco. By the constitution of 1879 the judges of the court named were superseded, but the powers given to them by the act referred to were not vested in any other person or tribunal. It was claimed by the relator in that case, as it is by the relator here, that under section 8, article V, and section 16, article XX, of the constitution, the office became vacant at the expiration of four years from the date of the defendant's appointment, and that the governor had the power to fill such vacancy. These contentions did not receive the sanction of the court; it was held that there was no vacancy which the governor was authorized to fill. Unless that case is to be overthrown, it is an authoritative adjudication against the claim of the relator herein, and entitles the defendant to hold the office until his successor has been appointed or elected, and has qualified, or until the office has been abolished by the power which created it. It would be sufficient to rest the decision herein upon a reference to that and other cases involving similar questions. . . . It is claimed that section 16 of article XX of the constitution makes it unlawful to occupy an office created by the legislature for a longer period than four years. The section provides, 'when the term of any officer or commissioner is not provided for in this constitution, the term of such officer or commissioner may be declared by law; . . . but in no case shall such term exceed four years.' This question, also, was passed

upon in *People v. Hammond, supra*, and requires no further notice."

In *People v. Newman*, 96 Cal. 605, the Hammond case being again cited and discussed, it is said: "This contention was fully presented by eminent counsel in *People v. Hammond, supra*, and a petition for rehearing was filed and denied. After such consideration and determination by the court, we think the point should be treated as finally settled."

It is thus apparent that the principle of the Hammond case has not only been reaffirmed, but has formed the basis of judicial determinations involving the existence and mode of filling other offices. As was said in *People v. Pond, supra*: "The effect which a decision overruling these cases would have upon municipal proceedings for over ten years past is so apparent that it is unnecessary for us to point out the reasons why we should adhere to the decision referred to." And to quote *People v. Freese*, 83 Cal. 453: "We see no good reason why the rule of *stare decisis* should not govern this case; and, looking ahead, we see good reasons why it should. It is not a matter of much importance who should temporarily have the office struggled for here. But it is a matter of considerable importance, in order to avoid uncertainty and disorder in the future, that those exercising power in the premises may have a settled rule to go by."

The judgment appealed from is affirmed.

TEMPLE, J., VAN FLEET, J., HARRISON, J., MCFARLAND, J., GAROUTTE, J., and BEATTY, C. J., concurred.

Rehearing denied.



[L. A. No. 61. Department One.—December 17, 1895.]

**AMELIA B. BAKER ET AL., RESPONDENTS, v. SOUTHERN CALIFORNIA RAILWAY COMPANY, APPELLANT.**

**ACTION IN JUSTICE'S COURT—LOSS OF ANIMALS—NEGLECT OF RAILWAY COMPANY TO FENCE TRACK—ISSUE AS TO OWNERSHIP OF LAND—APPELLATE JURISDICTION.**—The supreme Court has appellate jurisdiction of an action brought in the justice's court to recover the value of domestic animals killed upon the owner's land by the cars and engine of a railway corporation which has neglected to fence its track, though the animals are of less value than three hundred dollars, if the defendant first filed a verified answer putting in issue the allegation of the complaint as to the ownership of the land, and the case is thereupon certified to the superior court for trial, as one involving the title to real estate; and it appearing that the ownership or possession of the land is a condition precedent to recovery, the fact that the defendant, by his appeal to the supreme court from the judgment of the superior court, or from the order denying a motion for a new trial, raises no question as to the matters giving jurisdiction to the supreme court, is not material to its jurisdiction, and a motion to dismiss the appeal, for want of jurisdiction, must be denied.

**APPEAL** from a judgment of the Superior Court of the County of San Diego and from an order denying a new trial. **GEORGE PUTERBAUGH**, Judge.

The facts are stated in the opinion of the court.

*William J. Hunsaker*, for Appellant.

The jurisdiction of the superior court, in cases transferred to it from the justice's court by virtue of section 838 of the Code of Civil Procedure, is special, and the action must be tried and determined upon the pleadings filed in the justice's court. (*City of Santa Cruz v. Santa Cruz R. R. Co.*, 56 Cal. 143; *City of Santa Cruz v. Spreckles*, 57 Cal. 133; *Arroyo etc. Co. v. Superior Court*, 92 Cal. 52; 27 Am. St. Rep. 91.)

*Withington & Carter*, for Respondents.

Raising the question of title to realty by pleading it, as a mere pretense of jurisdictional matter, without the invocation of the judicial function thereon, and after-

ward abandoning it, does not oust the justice's court's jurisdiction and give it to the superior court. (Const., art. VI, sec. 4; *Oullahan v. Morrissey*, 73 Cal. 297; *Langan v. Langan*, 83 Cal. 618; *Salmina v. Juri*, 96 Cal. 420; *Fairbanks v. Lampkin*, 99 Cal. 429.)

GAROUTTE, J.—This is a motion to dismiss an appeal upon the ground of lack of jurisdiction in this court to entertain it. Section 485 of the Civil Code provides: "Railroad corporations must make and maintain a good and sufficient fence on either or both sides of their track and property. In case they do not make and maintain such fence, if their engine or cars shall kill or maim any cattle, or other domestic animals upon their line of road which passes through or along the property of the owner thereof, they must pay to the owner of such cattle or other domestic animals a fair market price for the same." Plaintiff brought an action in the justice's court, under the provisions of this section of the Civil Code, to recover for the value of two certain domestic animals killed by the cars and engine of defendant, said animals being of the value of one hundred and thirty dollars. It will be noticed that by this section it is contemplated that the plaintiff must be the owner of the land through which the line of road passes, and an allegation of ownership was made in the complaint in the present case. Defendant filed a verified answer, and, among other things, put in direct issue the allegation of the complaint as to the ownership of the land, and demanded that the case be certified to the superior court for trial, as one involving the title to real estate. The case was thereupon certified to the superior court, where judgment went for plaintiffs, and the appeal was taken which we now have under consideration.

We think the appeal will lie. This court has appellate jurisdiction "in all cases at law which involve the title or possession of real estate"; and, in this case, the title, or at least the possession, of a certain tract of land

was involved. It was a material fact in the case, and the establishment of that fact was a condition precedent to a recovery. In cases like the present one, jurisdiction of the court is determined by the nature of the evidence necessary to support the material allegations of the complaint. And the fact that defendant, by his appeal to this court from the judgment or from the order denying a motion for a new trial, has raised no question as to those matters which give jurisdiction to this court, is not material as shedding light upon the disposition of the motion we are now considering. We indorse the views of the learned commissioner, as expressed in the case of *Hart v. Carnall-Hopkins Co.*, 103 Cal. 132, and in consonance with the principle there declared we conclude the motion to dismiss the appeal must be denied; and it is so ordered.

HARRISON, J., and VAN FLEET, J., concurred.

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[No. 15986. Department One.—December 17, 1895.]

C. B. WILLIAMS, RESPONDENT, v. SOUTHERN PACIFIC RAILROAD COMPANY, APPELLANT.

**PARTNERSHIP—ACTION BY ONE PARTNER—NONJOINDER OF COPARTNERS—PLEADING—ANSWER—EVIDENCE—NONSUIT.**—One member of a partnership may recover the whole amount due his firm, unless the defendant plead the nonjoinder of the other members of the firm as parties to the action; and, where there is no such plea in the answer, the plaintiff cannot be nonsuited merely because a partnership demand is proven, instead of a separate demand due to the plaintiff.

**ID.—CONFLICTING INSTRUCTIONS—ABSENCE OF EXCEPTION—ERROR IN FAVOR OF APPELLANT.**—Where the court gives conflicting instructions, and there is no exception to the instructions objected to as erroneous, and it appears that the only error in the conflicting instructions was in favor of the appellant, the conflict is no ground for reversal.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. JOHN HUNT, Judge.

The facts are stated in the opinion.

*Maxwell, Dorsey & Soto*, for Appellant.

The action should have been brought by the partnership, and not by C. B. Williams, individually. (Storges on Partnership, 6th ed., secs. 241, 244; Parsons on Partnership, 3d ed., \*329, 330, note q; \*334, 335, and cases in notes j, k; *Williams v. More*, 63 Cal. 50; *Shepard v. Ward*, 8 Wend. 542; *Stevens v. Lunt*, 19 Me. 70; *Creel v. Bell*, 2 J. J. Marsh. 309; *Wilson v. Wallace*, 8 Serg. & R. 53; *Gage v. Rollins*, 10 Met. 348, and cases there cited; 17 Am. & Eng. Ency. of Law, 1236-43, and notes; *Brainard v. Beitram*, 5 Abb. N. C. 103; *Cushing v. Marston*, 12 Cush. 431; *McCord v. Seale*, 56 Cal. 262; *Graves v. Boston etc. Ins. Co.*, 2 Cranch, 215; *Cotes v. Campbell*, 3 Cal. 191; *Morrison v. Bradley*, 5 Cal. 503; *Green v. Covillaud*, 10 Cal. 322; 70 Am. Dec. 725; *Weinreich v. Johnston*, 78 Cal. 254, 256, 257; *Shain v. Forbes*, 82 Cal. 577, 584; *Wise v. Williams*, 72 Cal. 544, 547; *Kirby v. Lake Shore etc. Ry. Co.*, 8 Fed. Rep. 462; *Webb v. Trescony*, 76 Cal. 621; *Daby v. Ericsson*, 45 N. Y. 786, 789, 790; *Fitnam's Trial Procedure*, 416.)

*J. C. Bates*, for Respondent.

Misjoinder or nonjoinder of parties must be objected to by demurrer or answer or the objection is waived. (Code Civ. Proc., secs. 430, 433, 434; *Wendt v. Ross*, 33 Cal. 650; *Calderwood v. Pyser*, 31 Cal. 333; *Gillam v. Sigman*, 29 Cal. 638; *Hastings v. Stark*, 36 Cal. 126; *Rutenberg v. Main*, 47 Cal. 221; *Tennant v. Pfister*, 51 Cal. 513; *Gruhn v. Stanley*, 92 Cal. 88; *Smith v. Dorn*, 96 Cal. 73; *Schwarze v. Mahoney*, 97 Cal. 133; *Foley v. Bullard*, 99 Cal. 516; *Baxter v. Hart*, 104 Cal. 344; *Bank of Havana v. Magee*, 20 N. Y. 362; *Hosley v. Black*, 28 N. Y. 444; *Merritt v. Walsh*, 32 N. Y. 685; *Patchin v. Peck*, 38 N. Y. 39; *Davis v. Bechstein*, 69 N. Y. 443; 25 Am. Rep. 218; *Sullivan v. New York etc. Co.*, 119 N. Y. 356; 1 Chitty on Pleading, 8th Am. ed., 11; *Dickinson v. Vanderpoel*, 2 Hun, 626.)

BRITT, C.—Action to recover compensation for certain paving and other street work which plaintiff alleged was done by him at defendant's request. The answer consisted of denials of the material averments of the complaint. The trial was before a jury, and the verdict and judgment were in plaintiff's favor for the amount of the alleged value of the work.

1. It was disclosed in the course of the evidence for plaintiff at the trial that the contract for the work was made orally between one Haley, the agent of defendant, and the plaintiff Williams—the latter acting, however, as was known to defendant, on behalf of a copartnership composed of Williams and two others, having no firm name, but carrying on business together and sharing its profits; the work in question was done by the firm at the joint expense. Thereupon defendant moved the court for judgment of nonsuit on the ground that plaintiff could not individually maintain the action upon a contract made with and performed by the partnership; which motion was denied.

There is no doubt that at common law all the members of a partnership, except dormant or merely nominal partners, must be joined as plaintiffs in an action of this character, and that before the code a motion for nonsuit made as in this instance would have been sustained. (*Cushing v. Marston*, 12 Cush. 431; *Collyer on Partnership*, secs. 649, 667; *Story on Partnership*, sec. 241; *Wilson v. Wallace*, 8 Serg. & R. 53.) In the case last cited, decided more than seventy years ago, the supreme court of Pennsylvania, while sustaining the precise objection made by defendant here, yet ventured this reflection: "Perhaps, weighing the conveniences and inconveniences, it would be more convenient that the parties should, after issue joined, proceed on the merits, than that the defendant should be allowed to nonsuit the plaintiff on a mere matter of form." There may be some room for debate whether the objection is matter of form only; but our legislation provides that of the parties to an action those who are united in inter-

est must be joined as plaintiffs or defendants (Code Civ. Proc., sec. 382) ; that the defendant may demur to a complaint for defect of parties plaintiff (section 430) ; that if the defect does not appear on the face of the complaint the objection may be taken by answer (section 433) ; and that if objection on that ground be not taken by demurrer or answer, the defendant is deemed to have waived the same (section 434). These provisions are substantially the same as the statutes of New York pertaining to the same subject; and under them it seems to be settled there that in actions upon contract, as well as in tort, one partner may recover the whole amount due his firm unless the defendant plead the nonjoinder. Among the reasons assigned is that the interest of a single partner extends to the entire demand; that as payment to him would discharge defendant's liability to the firm, a recovery of the whole in the action by him has the like effect. (*Zabriskie v. Smith*, 13 N. Y. 322; 64 Am. Dec. 561; *Patchin v. Peck*, 38 N. Y. 39; *Dickinson v. Vanderpoel*, 2 Hun, 626. See, also, *Sullivan v. New York etc. Co.*, 119 N. Y. 348; *Chapin v. Clemiston*, 1 Barb. 311.) In the view of the Minnesota court, the change in this behalf introduced by the code accords with the suggestion above quoted from *Wilson v. Wallace, supra*, and it held that the ground here taken by appellant is untenable unless the objection is specially pleaded. (*Davis v. Chouteau*, 32 Minn. 548.) To similar effect is *Dunn v. Hannibal etc. R. R. Co.*, 68 Mo. 268. And in England, since the judicature acts of 1873-75, and the orders promulgated under them, the failure to join all the partners as plaintiffs is no longer fatal to an action. "If all the members of a firm sue when one only ought to do so, or one only sues when all ought to do so, and the defendant can show that he is thereby prejudiced, he can apply to have the improper parties struck out, or the proper parties joined, as the case may be." (Lindley on Partnership, 278.)

The question being not wholly clear on the cases in this state, it has seemed proper to refer thus briefly to

the practice prevailing in other jurisdictions. In *Andrews v. Mokelumne Hill Co.*, 7 Cal. 330, the plaintiff sued for his proportion of a joint debt, alleging that the residue had been paid to his co-contractor; the defendant pleaded in its answer that the debt sued on was due, if at all, to plaintiff and such other as partners, and denied the right of plaintiff to recover any portion thereof as his separate demand. The court held on a rehearing—affirming the judgment for plaintiff—that the objection, if any, appeared on the face of the plaintiff's complaint, and that by failing to demur the defendant had waived the point. There are, however, some later cases from which may be argued, as appellant has done, with considerable plausibility that proof of a partnership claim only, under the issues here, presents an instance of failure of proof. (*McCord v. Seale*, 56 Cal. 262; *Weinreich v. Johnston*, 78 Cal. 254; *Webb v. Trescony*, 76 Cal. 621. See, also, *Baxter v. Hart*, 104 Cal. 344.)

But the question now raised was not involved in any of these cases; and, on the other hand, it has been often decided that defect of parties having a joint interest with plaintiff in the contract, or other subject of the action, must be pleaded (*Trenor v. Central Pac. R. R. Co.*, 50 Cal. 222; *Wendt v. Ross*, 33 Cal. 650; *Dunn v. Tozer*, 10 Cal. 167); thus, in *Foley v. Bullard*, 99 Cal. 516, a judgment in favor of plaintiff enforcing the lien of a street assessment, he being one of two owners of the demand in suit, was sustained; the court saying that if the defendants would rely upon the defect of parties plaintiff the objection should have been presented in their answer. In *Rutenberg v. Main*, 47 Cal. 221, the court said that the statutory provision requiring an objection for misjoinder of defendants to be pleaded, "to the extent necessary to give it effect controls the principle that the proofs and allegations must correspond."

The object of the statute is to bring the parties to speedy issue and trial on the merits; and we are of opinion, following the incontestable trend of authority, that the absence as parties of some of the partners from a com-

plaint by one or more of them on a partnership demand does not, speaking strictly, affect the merits, and in order to be considered must be pleaded by the defendant. The motion for nonsuit was therefore properly denied.

2. At the close of the evidence the court instructed the jury, on the request of the defendant, that if they found that plaintiff made the alleged contract on behalf of his firm, and that the firm did the work at the expense of the partnership pursuant to such contract, and none other, they should find for defendant. The court then, of its own motion, gave the jury other instructions which, defendant contends, were contradictory of that above stated and nullified its effect; we agree with this contention, but defendant took no objection or exception to such additional instructions, and must be deemed to have consented to the presentation of the case to the jury in this manner. (*Wilkinson v. Parrott*; 82 Cal. 102.) Moreover, the first instruction, being upon a point not in issue, was erroneous; and, being in favor of appellant, the conflict with other instructions is no ground for reversal. (*Dennison v. Chapman*, 105 Cal. 448.)

The judgment and order should be affirmed.

BELCHER, C., and HAYNES, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

HARRISON, J., GAROUTTE, J., VAN FLEET, J.



[L. A. No. 9. Department One.—December 17, 1895.]

**MARK MEHERIN, ASSIGNEE, ETC., RESPONDENT, v.  
J. N. SAUNDERS ET AL., APPELLANTS.**

**CONSTABLE'S SALE—RETURN OF PURCHASE MONEY—LIABILITY OF SURETIES UPON BOND.**—Upon a constable's sale of real estate the constable cannot impeach his return as to the amount of money received by him for the property, and he and the sureties upon his official bond are liable for the full amount returned as having been received, although he did not receive the money in fact, but accepted a check for a large part of the money which was never paid.

**ID.—BID BY PURCHASER FOR JUDGMENT CREDITOR—DEFENSE NOT PLEADED.**—The constable and his sureties cannot rely upon the fact that the purchase was made by the purchaser as the agent for the judgment creditor, with the understanding that only enough was to be paid to satisfy the executions held by the constable, where no such defense is pleaded in the answer, and there is no offer to amend the pleadings to present such defense.

**APPEAL** from a judgment of the Superior Court of Santa Barbara County and from an order denying a new trial. **W. B. COPE**, Judge.

The facts are stated in the opinion of the court.

*W. I. Nichols*, for Appellants.

The certificate of sale is not the equivalent of the sheriff's return, and, if it were, it would not be conclusive. (Code Civ. Proc., sec. 1973; *People v. Huson*, 78 Cal. 154; *Placer County v. Dickerson*, 45 Cal. 12; *Cravens v. Dewey*, 13 Cal. 43; *Mitchell v. Hackett*, 14 Cal. 666.) The acceptance of the check did not amount to a payment of the purchase price. (Boone on Banking, Nos. 181, 185, 186.) In view of the allegations of the complaint, it was incumbent upon plaintiff to prove an actual payment of ten thousand dollars, since that fact was positively denied in the answer. (*Gilman v. Bootz*, 63 Cal. 120; *Cox v. McLaughlin*, 63 Cal. 196; *O'Brien v. Western Steel Co.*, 100 Mo. 182; 18 Am. St. Rep. 536.) Statutory penalties are only recoverable when by the return of the sheriff he admits the collection of money and refuses to pay it over. (*Johnson v. Gorham*, 6 Cal. 195; 65 Am. Dec. 501.)

*Grant Jackson, and Mich. Mullany, for Respondent.*

The officer must be held conclusively to have received the purchase price for which he sold the property and issued his certificate of sale. (Freeman on Executions, sec. 443; *Mitchell v. Hackett*, 14 Cal. 661; *Harris v. Ellis*, 30 Tex. 4; 64 Am. Dec. 296; *Crutchfield v. Robins*, 5 Humph. 15; 42 Am. Dec. 417; *Cooney v. Wade*, 4 Humph. 444; 40 Am. Dec. 657.) The officer cannot deny that the purchase price was paid, etc., while his return shows not only a sale for the money, but also the receipt of the money. (*Ferguson v. Tutt*, 8 Kan. 370; *Tiffany v. Johnson*, 27 Miss. 227; *Townsend v. Olin*, 5 Wend. 207; Freeman on Executions, sec. 360; *Holt v. Robinson*, 21 Ala. 106; *Boas v. Updegrove*, 5 Pa. St. 516; 47 Am. Dec. 425.) This rule prevails where the officer seeks to show that he received notes or other property which he was not authorized to take in satisfaction, as well as where he offers to prove that he received nothing whatever, etc. (*Harper v. Fox*, 7 Watts & S. 142; *Fitch's Appeal*, 10 Pa. St. 461; 51 Am. Dec. 495, and note.)

GAROUTTE, J.—This is an action by the assignee of the California Steamship Company, an insolvent corporation, against defendant Saunders, as constable of judicial township No. 5 of Santa Barbara county, and the sureties upon his official bond. Defendants appealed from a judgment rendered against them, and also from an order denying their motion for a new trial.

Saunders, as constable, held certain executions running against the California Steamship Company, prior to insolvency proceedings. One of these executions he levied upon its real estate, and proceeded to sell the same. At the sale one Ambrose bid \$10,000 for the property, and it was knocked down to him as the highest bidder. Thereupon, in payment of the purchase price, he gave the constable \$855 in money and his personal check for the balance, amounting to \$9,145. Ambrose was well known to the officer, and of sound financial standing. The constable issued to him a cer-

tificate of sale in proper form, and satisfied the executions, including accruing costs, with the money received. At this stage of the proceedings Ambrose stopped payment upon the check, and the money therefor has never come into the hands of the constable. This action is brought to recover from the constable the amount of the check, as money in his hands received at the sale. There are a great many matters set out in the answer which are purely surplusage and no defense to the allegations of the complaint. The only statement found therein which would seem to possess the semblance of a defense to the action is the allegation that the defendant constable executed the certificate of purchase set out in the complaint "without consideration, and through misapprehension, mistake, surprise, and excusable neglect," but we find nothing in the evidence to support this allegation, conceding such an issue to be a material one.

Under the evidence we are bound to hold that the entire \$10,000 was received by Saunders, the constable. It is settled law that a sheriff cannot impeach his return as to the amount of money received by him at execution sale, and, certainly, this could not be done as to the judgment debtor. (*Harvey v. Foster*, 64 Cal. 296.) But, conceding that the certificate of purchase here issued is not the equivalent of the sheriff's return, and that there is no paper in this record such equivalent, still the evidence as to the character of the transaction is indisputable, and, by the constable's own words, his liability is fixed. He says: "I did collect in coin from Ambrose \$855. The reason I did not collect the balance of that \$10,000 from him was because Mr. Ambrose didn't have the money with him, and I supposed the check was good; knowing he was good, I took it in lieu of that much money, and gave him the certificate of sale for that \$10,000, and acknowledged the receipt of the \$10,000 in that certificate of sale. I never tried to collect that money from Donahoe, Kelly & Co. I have not, up to this time, demanded of Ambrose to pay that check in money. I gave him the certificate of sale be-

cause I supposed that I had received the money, counting the check. I suppose—well, I knew he was good for it, and I put it in as that much money, supposing it would be paid.” This principle of law, as to the conclusiveness of the sheriff’s return as against him, equally applies where he attempts to show that he received notes or other property in lieu of money in satisfaction of the judgment or execution. (*Harper v. Fox*, 7 Watts & S. 142; *Fitch’s Appeal*, 10 Pa. St. 461; 51 Am. Dec. 495.) Reduced to its simplest form, the case is this: The constable sold the property for a certain sum, issued his certificate of purchase, and failed to collect a portion of the purchase price. Upon such a state of facts he is clearly liable for the entire amount. He cannot be allowed to say, “I never collected the money from the purchaser; or I took his check for the purchase price, thinking it was as good as the money; or he beguiled me into giving a certificate of purchase, and then refused to pay the amount he owed me upon the purchase, and, consequently, I am not liable.”

While the purchaser, Ambrose, was upon the witness-stand, in answer to a question of counsel as to why he did not pay the balance of the purchase price of the property, he said in effect that, as between him and the California Steamship Company, it was never intended to be paid; that he was acting for the corporation in making the bid, and only intended to advance sufficient money to pay off the executions held by the constable. This evidence came in under objection that it was outside of the issues made, and such is the fact. If defendants in the first instance, by their answer, had made an issue in line with such evidence, or had asked the court for the privilege of amending their answer when the evidence was given, and had been refused such privilege, it would seem the result of this litigation might have been entirely different. For such an agreement between Ambrose and the corporation, under proper pleadings, would have formed a material, as well as interesting, branch of the case.

We perceive no error in the action of the court in correcting the insubstantial defects in the constable's bond. The case appears to be one of hardship upon the defendant constable, but we find no path marked out in the law by which he may escape the serious results to him following his own negligence. Probably he has his remedy over against Ambrose for the balance of the purchase price, for, by the record, Ambrose appears to be financially responsible.

For the foregoing reasons the judgment and order are affirmed.

HARRISON, J., and VAN FLEET, J., concurred.

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[No. 15990. Department One.—December 17, 1895.]

A. C. FREESE, ADMINISTRATOR, ETC., APPELLANT, v.  
JAMES C. PENNIE, JR., EXECUTOR, ETC., RESPOND-  
ENT.

ESTATES OF DECEASED PERSONS—ALLOWANCE OF ATTORNEY'S FEES—  
EXPERT WITNESSES—CONSENT OF HEIR.—Upon the allowance of  
attorney's fees in the probate court for services rendered to the  
administrator of a decedent, although the evidence of attorneys  
is competent, the trial court is not bound to fix the amount of  
the fee in accordance with their opinions; and where the allow-  
ance made is less than the estimate of any expert witness who  
testified, and was consented to by the attorney for the sole heir  
interested in the estate, it will not be disturbed upon appeal.

APPEAL from a judgment of the Superior Court of  
the City and County of San Francisco. WALTER H.  
LEVY, Judge.

The facts are stated in the opinion of the court.

W. H. H. Hart, and J. D. Sullivan, for Appellant.

Naphtaly, Freidenrich & Ackerman, and H. G. Platt,  
for Respondent.

GAROUTTE, J.—James C. Pennie, having acted as ad-  
ministrator *de bonis non* of the estate of Thomas H.

Blythe, deceased, from May, 1889, until his death in December, 1893, his executor, James C. Pennie, Jr., the defendant herein, was cited in this proceeding to account for his testator's administration of the estate of Blythe. In answer to this citation he rendered an account of such administration, in which he claimed a credit for his testator for fees paid and to be paid to Messrs. Naphtaly, Freidenrich & Ackerman, for legal services rendered in the matter of the estate of Blythe during the term of his testator's administration thereof. The only question as to the credit claimed related to the amount thereof, and that question was submitted to the court, on evidence of the services rendered by said legal firm, including expert testimony as to the value of such services. The court allowed and ordered paid from the estate of Blythe the sum of eighty thousand dollars, and this appeal is from that order.

There was no conflict of evidence, either as to the amount of the services or the value thereof. The disinterested expert witnesses as to the value of the services were all eminent attorneys at law, practicing in the city of San Francisco. The average of their estimates of the value of the services rendered by the aforesaid legal firm was about ninety thousand dollars, and the estimate of each of them was above eighty thousand dollars.

At the close of defendant's evidence on this issue Mr. W. H. H. Hart, attorney for Florence Blythe Hinckley, sole heir of Thomas H. Blythe, and Mr. Horace G. Platt, attorney for defendant, addressed the court as follows:

"*Mr. Hart.* I have had a conversation with Messrs. Naphtaly, Freidenrich & Ackerman with reference to the matter of their compensation, and they have stated to me that they will not make a claim for more than eighty thousand dollars; out of that sum they are to pay Mr. John A. Wright for services rendered by him during the Pennie administration, and also deduct from said sum the amount they have already received on account, and with that understanding, viz., that they are not to

make any greater claim than eighty thousand dollars in the aggregate, we do not care to submit any testimony contrary thereto."

Mr. Horace G. Platt, attorney for defendant, stated: "That will be satisfactory to us."

Mr. J. D. Sullivan, attorney for the plaintiff, was present at the time these statements were made, but it does not appear that he said anything relating to the subject of them, or that he objected to Mr. Hart's proposal.

In their brief, counsel for appellant say: "If expert testimony is binding upon this court in cases of this character, then we are compelled to admit that the allowance of eighty thousand dollars to said attorneys for their services is not excessive." But plaintiff's counsel oppose the soundness of that principle, and upon their view and construction of the opinion of the court in the case of *Estate of Dorland*, 63 Cal. 281, contend that this court, regardless of the finding of the trial court, should review the evidence as to the value of the services rendered, and then compare its own judgment of their value with that of the expert witnesses, and thereupon make such allowance as may be considered just. We think that case does not go to the lengths here insisted upon, and the principle there declared does not apply to this court as an appellate court. The true rule is the one there announced, and that is, the trial court is not bound to fix the amount of the fee in accordance with the opinion of expert gentlemen, learned in the law. While such evidence is proper, and always admissible by way of assisting the court in arriving at a conclusion, it is not at all conclusive upon the trial court; and it is for that court to say, upon a consideration of all the evidence, taken in connection with its own best judgment, what would be a fair and just allowance for the services rendered. Attorneys are inclined to place a very high estimate upon the value of their services when rendered in important litigation; and, also, inclined to look with kindly eyes and sympathetic feelings upon the efforts of brother attorneys when engaged in establishing be-

fore the court the value of services performed in large estates fortunate enough to possess well-filled coffers. Under these conditions, when upon the witness-stand as experts, they entertain most liberal views as to what should be the amount of a brother attorney's allowance, and hold large ideas as to the importance of the litigation in which he has been engaged. It is well, and it is the law, that the court should temper this kind of evidence with its own calm judgment, based upon the amount and kind of labor performed, and to thereupon make its decree. When a court has done this, this court, as an appellate court, only has the right to interfere with its judgment when a plain and palpable abuse of its discretion (for it has a large discretion in such matters) has occurred.

While the fee allowed in the present case is a very large one, still we think the judgment must stand. It appears that the allowance made is less than the estimate of any witness who testified, and such fact indicates that the trial court did not consider itself absolutely bound by the expert testimony presented. Under these circumstances we cannot say that the allowance is clearly and palpably too great. In addition, it appears that the sole heir to the estate, by her counsel in open court, at the trial, consented to an allowance of this amount. Practically and substantially she is the only party interested in this litigation, for the amount of the fee must come from her estate. The administrator is here as an appellant, testing the validity of this decree, presumptively for his own security as a disbursing agent only.

For the foregoing reasons the judgment is affirmed.

VAN FLEET, J., concurred.

TEMPLE, J., concurring.—I concur in the judgment on the ground last discussed by Mr. Justice Garoutte. I do not think the learned judge of the probate court could have used his own judgment as to the sum to be allowed, for there is nothing in the record which would



justify as a matter of discretion the allowance of so large a sum. The court properly allowed the sum agreed to by the party who must pay it.

Courts have no right to be liberal with the money of other people, and should be careful that fees allowed for trust estates are no larger than would be paid for like services by those who are competent to contract for themselves.

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[No. 15944. Department Two.—December 17, 1895.]

MARY MAHONEY ET AL., RESPONDENTS, v. SAN FRANCISCO AND SAN MATEO RAILWAY COMPANY, APPELLANT.

NEGLIGENCE—STREET RAILWAY—COLLISION—RIGHTS OF TRAVELERS IN ADVANCE OF CAR—PRESUMPTION.—A street railway company has no exclusive use of any portion of the highway, its right being to a use in common with the public, and peculiar only so far as its inability to move from its track makes it so; and travelers upon the highway going in the same direction in advance of a street-car have a right to presume that the street railway company will use its franchise in view of the rights of others to avoid a collision.

ID.—CONTRIBUTORY NEGLIGENCE—DRIVING NEAR TRACK AT NIGHT—DUTY OF ELECTRIC RAILWAY.—It is not negligence *per se* to travel along or near to the track in the same direction in which an electric car is going; but it is the duty of the electric railway to maintain a sufficient light at night upon the car to see an obstruction in time to stop the car, or to move with less velocity, so as to avoid a collision with a traveler driving upon or near the track in advance of the car.

ID.—ACTION FOR DEATH—EVIDENCE—MEANS OF CHILDREN.—In an action for death, brought by the wife and minor children of the deceased, it is erroneous to allow the plaintiffs to prove that the children have no means of their own.

ID.—IRREGULARITY—ALLUSION OF JUDGE TO POVERTY OF PLAINTIFFS—IMPROPER STATEMENTS TO JURY—NEW TRIAL.—Where it appears that after the jury had been out for several hours without agreement, they were brought into court with a statement of failure to agree, and that the judge, after finding out that the jury stood eight to three, called attention to the fact that, if the jury could not agree, all the expenses would fall upon the plaintiff, who was not well off, and informed them that the plaintiff required nine men, and that if it was possible for one of the three to arrive at a conclusion, anything the judge could do he would cheerfully do, and stated that he would send them out once more, and give them a chance to try to agree, expressing the opinion that, when

the jury appreciated the circumstances and situation of the parties, they would make one more effort to do it, after which the jury returned a heavy verdict for the plaintiff in a few minutes, a new trial should be granted for irregularity on the part of the court.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. JOHN HUNT, Judge.

The facts are stated in the opinion of the court.

*Henley & Costello*, for Appellant.

The question of contributory negligence becomes a question of law when it arises upon undisputed and clearly ascertained facts, about which there is no conflict of evidence, and where the course of ordinary prudence is clear, and was not followed by the plaintiff. (*Flemming v. Western Pac. R. R. Co.*, 49 Cal. 257; *Deville v. Southern Pac. R. R. Co.*, 50 Cal. 383; *Glascock v. Central Pac. R. R. Co.*, 73 Cal. 141; *Trousclair v. Steamship Co.*, 80 Cal. 525; *Esrey v. Southern Pac. Co.*, 88 Cal. 406; *Hager v. Southern Pac. Co.*, 98 Cal. 309.) It is contributory negligence to drive toward and upon a railroad crossing without using any precaution to look or listen for an approaching train in time to stop before crossing the track. (*Turner v. Hannibal etc. R. R. Co.*, 74 Mo. 603; *Underhill v. Chicago etc. Ry. Co.*, 81 Mich. 43; *Nash v. New York Cent. etc. R. R. Co.*, 125 N. Y. 715; *Chase v. Maine Cent. R. R. Co.*, 78 Me. 346; *Terre Haute etc. R. R. Co. v. Clark*, 73 Ind. 169, 174; *McCull v. New York Cent. R. R. Co.*, 54 N. Y. 643; *Hanover R. R. Co. v. Coyle*, 55 Pa. St. 401; *Pennsylvania R. R. Co. v. Beale*, 73 Pa. St. 509; 13 Am. Rep. 753; *Union Pac. Ry. Co. v. Adams*, 33 Kan. 427; *Pennsylvania R. R. Co. v. Righter*, 42 N. J. L. 181, 187; *Gothard v. Alabama etc. R. R. Co.*, 67 Ala. 115, 119; *Louisville etc. Ry. Co. v. Stommel*, 126 Ind. 35; *Rhoades v. Chicago etc. Ry. Co.*, 58 Mich. 263; *Cincinnati etc. Co. v. Howard*, 124 Ind. 284; 19 Am. St. Rep. 96; *Mann v. Belt R. R. etc. Co.*, 128 Ind. 138; *Harris v. Minneapolis etc. Ry. Co.*, 37 Minn. 47; *Brown v. Milwaukee etc. Ry. Co.*, 22 Minn. 165; *Pence v. Chicago etc.*

*Ry. Co.*, 63 Iowa, 746.) The failure to give signals does not excuse plaintiff in omitting the precaution which any person of ordinary prudence would have exercised under the circumstances. (*Fleming v. Western Pac. R. R. Co.*, *supra*; *Glascoek v. Central Pac. R. R. Co.*, *supra*; *Kenna v. Central Pac. R. R. Co.*, 101 Cal. 27; *Trousclair v. Steamship Co.*, *supra*; *Hager v. Southern Pac. Co.*, *supra*; *Dascomb v. Buffalo etc. R. R. Co.*, 27 Barb. 221, 222; *Mackey v. New York Cent. R. R. Co.*, 27 Barb. 528, 542; *Benton v. Central R. R. Co.*, 42 Iowa, 192; *Indiana etc. Ry. Co. v. Hammock*, 113 Ind. 1; *Allen v. Maine Cent. R. R. Co.*, 82 Me. 111; *Salter v. Utica etc. R. R. Co.*, 75 N. Y. 279.) The remarks and conduct of the trial judge to the jury when they returned to the courtroom and reported that they could not agree, were prejudicial to the defendant, as they were in favor of the plaintiff and tended to create a prejudice against defendant. (*Oleson v. Meader*, 40 Iowa, 662; *Taylor v. Betsford*, 13 Johns. 487; *People v. Backus*, 5 Cal. 276, 277; Hayne on New Trial and Appeal, sec. 27, et seq; *McMinn v. Whelan*, 27 Cal. 320; *People v. Bowers*, 79 Cal. 416; *People v. Wells*, 100 Cal. 459; *People v. Kindleberger*, 100 Cal. 367; 2 Thompson on Trials, 1649, 1651; *McConnell v. State*, 22 Tex. App. 354; 58 Am. Dec. 648-55, and note; *Martin v. State*, 63 Miss. 505; 56 Am. Dec. 814-24, and note.) The right of the public to drive upon or along the tracks of a street railroad, where such right exists, is subject to the requirement of due care to avoid collisions with the cars, and to give them ample room to pass, at their usual rate of speed. (*Swain v. Fourteenth Street R. R. Co.*, 93 Cal. 184; *McKeever v. Market Street R. R. Co.*, 59 Cal. 295; *Ehrisman v. East Harrisburg etc. Ry. Co.*, 150 Pa. St. 180; Booth on Street Railways, 409, 410; *Rascher v. East Detroit etc. Ry. Co.*, 90 Mich. 418; 80 Am. St. Rep. 447.)

*Garber, Boalt & Bishop, Crittenden Thornton, F. H. Merzbach, and J. F. Riley, for Respondents.*

All the instructions presented by appellant were prop-

erly refused by the court, as none of them recognize any duty of the defendant to give any signals or use any precautions whatever. (*Shea v. Potrero etc. R. R. Co.*, 44 Cal. 419.) It is negligence to run a car along a narrow and unlighted alley in a dark night at a rate of speed that will not permit its stoppage within the distance covered by its own headlight. (*Gilmore v. Federal Street Ry. Co.*, 153 Pa. St. 31; 34 Am. St. Rep. 682; *Rascher v. East Detroit Ry. Co.*, 90 Mich. 413; 30 Am. St. Rep. 447.)

TEMPLE, J.—This action was brought by the widow and six children of Florence Mahoney, deceased, to recover damages for his death, which they allege was caused by the negligence of the defendant.

A verdict of ten thousand dollars was rendered, and this appeal is taken by the defendant from the judgment and from an order refusing a new trial.

The defendant was engaged in operating a street railway on which cars were propelled by electricity, by the overhead or trolley system. The accident occurred on the old mission road—a public highway—within the city and county of San Francisco, at about 10 o'clock, upon a dark and foggy night. Deceased and three companions were driving along on the highway and took no pains to keep clear of the track, although there was sufficient space to enable them to do so. The driver testified at the trial: "The road was plenty wide there; there was plenty of room to keep away from the track. I kept closer to the track than the gulch to be sure. I could not tell when I would strike a boulder in the road. I did not drive far enough from the track to clear the car; my intent was to clear the ditch on the right hand side without reference to the track. I did not aim to keep clear of the track at all. I depended upon the lights coming along so we could see it or hear something and then turn out of the way. I intended to rely upon hearing or seeing. I did not stop at any time to look or listen, for the reason I had people behind and depended upon them. The noise of the vehicle and of

the wind might to some extent interfere with my hearing an approaching car, but still we did not stop."

The road at that point was descending at the rate of about two hundred and ninety feet to the mile, in the direction in which the party was traveling. Defendant's car, coming up behind, was proceeding by gravitation down the grade at a rate variously estimated as from ten to twenty miles per hour. It struck the wagon in which deceased and his companions were, killed the deceased, and very seriously wounded two others.

Appellant contends that the judgment should be reversed because it was not shown that the deceased was without fault, and because it is so clear from the evidence that there was contributory negligence that no other rational conclusion can be drawn from it.

This contention cannot be maintained. The defendant had no exclusive use of any portion of the highway. Its right was to a use in common with the public, being peculiar only so far as its inability to move from its track made it so. Travelers upon the highway had a right to presume that it would use its franchise in view of the rights of others. If the light of the car was liable to go out because the trolley frequently jumps the wire, other lights should have been employed; and, if an obstruction cannot be seen by its light in time to stop the car, it should move at less velocity. Other travelers should use reasonable diligence to avoid obstructing the track, and it may be that under some circumstances a jury would be justified in finding it negligent for one to travel along the track; but it certainly is not negligence *per se*, and I see nothing in this case which would justify our reversing the verdict; on the contrary, I do not see how the jury could have found otherwise. The law applicable to the matter is correctly stated in *Shea v. Potrero etc. R. R. Co.*, 44 Cal. 414.

There was no error in giving or refusing instructions to the prejudice of appellant.

Appellant claims a great many errors of law committed by the court at the trial. Most of them seem to

be trivial. It was, however, in my opinion, clear error to allow plaintiffs to prove that the children of the deceased (plaintiffs here) had no means of their own. Such testimony could have been offered for no other purpose than to create prejudice, and should have been excluded.

I think the judgment must be reversed for irregularity on the part of the court. As appears from affidavits filed on the motion for a new trial, after the jury had been out for about four and one-half hours, they were brought into court, when the following occurred:

*"The Foreman.* I think it is impossible for the jury to agree. One juror seems to be a little doubtful about some points of law.

*"The Court.* If there is anything that I can give you, instructions as to any question of law to help you to arrive at a verdict, I will be pleased to give them. If the juror who desires to ask a question will ask it, I will endeavor to answer it.

*"A Juror.* For may part I do not require any more or further information in regard to the law, because the others do not seem to agree with me.

*"The Court.* If it is about the testimony of any witness, it can be read to you.

*"A Juror.* No, sir.

*"The Court.* Is there any difference in your understanding of the instructions?

*"A Juror.* That is it.

*"The Court.* If there is, I will give it to you over again.

*"A Juror.* It don't make any difference about the instructions. That would not alter the case.

*"The Court* (to the foreman). Mr. Bent, without telling me in whose favor you stand, whether for plaintiff or defendant, how do you stand numerically, six to six, or four to eight, or how?

*"A Juror.* We stand eight to three, and it has been so since we went into the room.

*"The Court.* This trial is a very expensive one, in-

deed, for both parties, particularly to the plaintiff, who is not well off, I believe; and if you disagree all of the time we have spent is absolutely lost, and the plaintiff has to pay all of the fees of this trial and expenses, and go at it again.

"If the jurors who cannot agree upon a verdict differ in their notions of what a witness has testified to, I will be most pleased to help you out. I do not want to try the case again, and counsel do not want to try it again, and the parties do not care to provide expenses again. If you differ as to what you regard as the result of the evidence, as to what you consider the proofs, then I cannot give you any instruction on the subject. I want to ask you if that is the difference between you?

"*A Juror.* It is not a matter of instructions. We understand it.

"*The Court.* It is a matter of what conclusions you reach from the evidence?

"*A Juror.* Yes, sir.

"*The Court.* Q. Three of your number believe a certain state of facts and the other eight believe another state of facts?

"*A Juror.* Yes, sir. If you were to have your charge reread, or rather your instructions—

"*The Court.* I will do that; or if you will tell me the particular point of law troubling you.

"*A Juror.* We do not understand what this gentleman wants to get at. He wanted to have your charge reread.

"*The Court.* What do the other two say about it?

"*A Juror.* The other two perfectly understand the evidence, I think.

"*The Court.* The plaintiff requires nine men, the same as if he had twelve on the panel. If it is possible for one of these three to arrive at a conclusion, anything I can do I will cheerfully do. There were delays in this case which makes the expenses quite heavy. They will be paid to you the same whether you give a verdict or not. If any of these gentlemen who entertain these

views desire to hear me give any portion of that charge and any instructions, and will indicate about what they want, I will be pleased to do it. I do not want to read them all unless you want to hear them all. They are very long, but if you will let me know upon what point. Do you understand the last instruction which just before dinner you asked to have read to you?

*"Jurors.* Yes, sir; we understood that.

*"A Juror.* I think this gentleman wanted to know whether they had any right upon that track or not. I think he is doubtful about that.

*"The Court.* I have told you that the street is a public highway, and that persons have the right to be upon the street and to use the street either as pedestrians or riding. They had a right to be upon the highway, in law.

*"Mr. Thornton.* Can I request an instruction upon that point?

*"The Court.* Not at present.

*"Mr. Costello.* I think that it is a point for the jury to decide.

*"The Court.* As a matter of law they had a lawful right to be upon that highway; the deceased and parties in the wagon had a lawful right to be upon that highway. The fact that they may have been actually driving upon the railroad track would not make them trespassers unless they did it in view of imminent danger, because the public as well as the railroad company have an equal right to the use of that public highway. It is admitted here that it is a public highway, which means a street or place open to the public for use either as pedestrian in walking, or vehicles driving. If that is the question of law you want to ask, I will say that they did have the right to be there driving.

'Is there any other question of law that you would like to ask me?

"Because I am going to send you out once more, and give you a chance to try to agree. I think that when you appreciate the circumstances and situation of the parties you will make one more effort to do it.



*"A Juror.* Does the law compel transportation companies to maintain a permanent light at night?

*"The Court.* In my opinion, it is the duty of a corporation using a public street or highway at night to provide lights sufficient to apprise people lawfully upon the highway of the coming or approach of a car. As a matter of law, I will state to you that a street-railway car company using the public highway, and using it by night, it is their duty to provide light sufficient to apprise people upon that highway, and, if traveling upon that highway, of their approach. And if, without any fault upon the part of the persons thus traveling, without fault upon their part directly contributing to the injury, they are injured, in consequence of the failure of the company to provide light, then I say that such party is entitled to recover. Do you understand that?

*"Jurors.* Yes, sir.

*"Mr. Costello.* We except to that portion of your honor's charge.

"The jury then again retired, and, after further deliberation, returned into court with a verdict for the plaintiff, and against the defendant, assessing the damages at ten thousand dollars."

It will be seen that, after finding out that the jury stood eight to three, the court called attention to the fact that all the expense would fall on the plaintiff, who was not well off. The judge then said: "If the jurors who cannot agree upon a verdict differ," etc. Who were these jurors? For, evidently, certain jurors were meant, and not all. But the judge made this matter evident, for when a juror said: "We do not understand what this gentleman wants to get at; he wanted to have your charge reread," the court asked, "What do the other two say about it?" Why did he not say "the other eight"; for they were as much failing to agree as the two. Evidently, it must have appeared to the jury that the court was insisting that the three, or one of them, should yield to the eight, for he proceeds to say

that plaintiff requires nine jurors. He only had eight, it seems; for why did he say *plaintiff* requires nine? Why not the defendant, or why specify either party? He finally said: "I am going to send you out once more, and give you a chance to try to agree. I think that when you appreciate the circumstances and situation of the parties you will make one more effort to do it." The affidavit shows that the jury then returned a verdict of ten thousand dollars for plaintiff, in from ten to twenty minutes.

The judgment and order are reversed and the cause remanded.

HENSHAW, J., and MCFARLAND, J., concurred.

Hearing in bank denied.

[No. 15964. Department Two.—December 17, 1895.]

B. E. MCKUNE, ADMINISTRATOR, ETC., ET AL., RESPONDENTS, v. SANTA CLARA VALLEY MILL AND LUMBER COMPANY, APPELLANT.

**NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION OF FACT.**—If the court is not satisfied that the evidence, as matter of law, establishes the contributory negligence of the plaintiff, or if it believes that under the evidence touching the conduct of the plaintiff, reasonable minds might differ upon the question whether or not he was negligent, that question is one of fact which it is the duty of the court to allow the jury to determine.

**ID.—FRIGHTENING OF HORSE—NEGLIGENCE OF MILL AND LUMBER COMPANY.**—Where a mill and lumber company has negligently piled and maintained lumber upon a public street, in violation of an ordinance, and the occupants of a buggy, driving upon the proper side of the roadway, were compelled to turn around a pile of lumber on the street, and were thus brought close to a railroad track, and then for the first time discovered that there were other piles of lumber that had to be passed, when for the first time they noticed an approaching train, and were caught in a position where they could neither advance nor retreat, nor cross the track with safety, and where they could not move to the roadside away from the approaching train because of the obstructing lumber, whereupon the horse became frightened by the approaching train, and backed upon the track to the injury of the plaintiff, the question of contributory negligence of the plaintiff is properly left to the jury.

- ID.—UNAUTHORIZED OBSTRUCTION OF HIGHWAY—OWNERSHIP OF LUMBER—PRESUMPTION OF RESPONSIBILITY.—Where lumber piled in front of a planing mill along the outside of a sidewalk was owned by a mill and lumber company, which operated the planing mill, it will be presumed, in the absence of any counter-showing, that it was piled there with the knowledge and consent of the owner, and the unauthorized obstruction of a highway to the injury of another is an act of negligence for which the mill and lumber company is responsible.
- ID.—FAILURE TO COMPLY WITH MUNICIPAL ORDINANCE.—The failure to comply with a municipal ordinance, or to perform a duty imposed by a municipal ordinance prohibiting the obstruction of a street, whereby the plaintiff was injured, is negligence *per se*.
- ID.—INSTRUCTIONS—LIMITATIONS.—An instruction in regard to the violation of an ordinance is not erroneous by reason of omitting a limitation which is not applicable to the case, or for not directly including the question of contributory negligence, when the instructions as a whole show that the jury was fully instructed upon the doctrine of contributory negligence.
- ID.—HUSBAND AND WIFE—MISJOINDER OF PARTIES AND CAUSES OF ACTION—WAIVER.—In an action for the recovery of damages for injuries done to the wife, the husband and wife are necessary parties; but where the husband has a separate cause of action for consequential damages to him for his wife's injuries the wife is neither a necessary nor a proper party, and the two causes of action cannot properly be joined; but, if they are joined, and the defendant fails to demur for the misjoinder, he is conclusively deemed to have waived the objection, and cannot object to evidence of the husband's necessary disbursements for physicians and nurses attending his wife, in proof of the allegations of the complaint.

APPEAL from a judgment of the Superior Court of Santa Clara County and from an order denying a new trial. W. G. LORIGAN, Judge.

The facts are stated in the opinion of the court.

*Frs. E. Spencer*, for Appellant.

The nonsuit should have been granted, as plaintiff was guilty of contributory negligence. (*Hager v. Southern Pac. Co.*, 98 Cal. 310; *Glascok v. Central Pac. R. R. Co.*, 73 Cal. 137; *Flemming v. Western Pac. R. R. Co.*, 49 Cal. 257; *Trousclair v. Pacific Coast S. S. Co.*, 80 Cal. 524; *Beck v. Vancouver Ry. Co.*, 25 Or. 32; *Holmes v. South Pac. etc. Ry. Co.*, 97 Cal. 167; *Cornelius v. Appleton*, 22 Wis. 635; *Goldstein v. Chicago etc. Ry. Co.*, 46 Wis. 404; *Town of Gosport v. Evans*, 112 Ind. 133; 2 Am. St. Rep. 164; *Pittsburg Ry. Co. v. Taylor*, 104 Pa. St. 306; 49

Am. Rep. 580; *McLaury v. McGregor*, 54 Iowa, 717; *Centralia v. Krouse*, 64 Ill. 19; *Durkin v. Troy*, 61 Barb. 437; *McGinty v. Keokuk*, 66 Iowa, 725.) The presence of lumber upon the street piled along a railroad track, and being conveyed to or from one's place of business, is not *per se* negligence, nor inhibited by the ordinance. (*Cook v. Johnston*, 58 Mich. 437; 25 Am. Rep. 703.) Merely owning the lumber, without having placed it on the street, nor maintained, nor having known that it was there before the accident, does not render the defendant liable. (*Hager v. Southern Pac. Co.*, *supra*.) The lower court erred in instructing the jury, in effect, that the mere fact of the violation of the ordinance is conclusive evidence of negligence, or is negligence *per se*, as it disregarded the conduct of the plaintiff and the duty imposed upon him under the circumstances, and relieved him of the consequences of his acts, when they contributed to the injury. (*Briggs v. New York Cent. etc. R. R. Co.*, 72 N. Y. 26; *Knupfle v. Knickerbocker Ice Co.*, 84 N. Y. 488; *Hayes v. Michigan Cent. R. R. Co.*, 111 U. S. 228; *Cook v. Johnston*, *supra*; *Hanlon v. South Boston R. R. Co.*, 129 Mass. 310; *Beck v. Vancouver Ry. Co.*, *supra*.) In an action of this kind the husband is a nominal party merely, and can recover nothing for the expenses caused him. The only damages recoverable are the actual damages done the wife. (*Fuller v. Naugatuck R. R. Co.*, 21 Conn. 557; *Barnes v. Hurd*, 11 Mass. 59; *Heirn v. McCaughan*, 32 Miss. 17; 66 Am. Dec. 558; *Barnes v. Martin*, 15 Wis. 240; 82 Am. Dec. 670; *Lewis v. Babcock*, 18 Johns. 443; *Brooks v. Schwerin*, 54 N. Y. 343; *Smith v. St. Joseph*, 55 Mo. 456; 17 Am. Rep. 660; *East Tennessee etc. R. R. Co. v. Cox*, 57 Ga. 252.)

S. G. Tompkins, for Respondents.

Where the facts are such that it is doubtful whether the acts imputed to the plaintiff as negligence were such as a person of ordinary prudence would have done, it should be submitted to the jury under instructions of the court. (*Fernandes v. Sacramento City Ry. Co.*, 52

Cal. 45; *Chidester v. Consolidated Ditch Co.*, 59 Cal. 197; *Andrews v. Runyon*, 65 Cal. 632; *Stephenson v. Southern Pac. Co.*, 102 Cal. 143.) The defendant, by not demurring to the complaint, waived the objection to the improper joinder of the husband's cause of action for expenses incurred by him, to that of his wife's for damages. (Code Civ. Proc., secs. 430, 434; *Heinlen v. Heilbron*, 71 Cal. 561.) The lower court did not err in instructing the jury that a failure to comply with a municipal ordinance is itself negligence. (*Siemers v. Eisen*, 54 Cal. 418; *Driscoll v. Market Street etc. Ry. Co.*, 97 Cal. 565; 33 Am. St. Rep. 203; *Higgins v. Deeney*, 78 Cal. 578; *Orcutt v. Pacific Coast Ry. Co.*, 85 Cal. 291.)

HENSHAW, J.—Appeals from the judgment and from the order denying defendant a new trial.

Samuel Jones and Elizabeth Jones, his wife, prosecuted this action, alleging that defendant piled and maintained lumber upon a public street of the city of San Jose, contrary to, and in direct and continual violation of, an ordinance of the city of San Jose, and in willful neglect and disregard of the rights, safety, and convenience of persons traveling along the highway. On May 23d, while these piles of lumber were so maintained, plaintiff, Elizabeth Jones, was being conveyed in a buggy driven by one Aurelia Jones along said street. Reaching the first pile of lumber, the driver was compelled to turn around it, and was thus brought close to a railroad track, and then, for the first time, became aware of the approach of a train. Being unable to turn out, or to move away, by reason of the lumber piles, the horse became frightened and backed the buggy into the passing cars, throwing out plaintiff Elizabeth Jones and seriously injuring her, to the damage of plaintiffs in the sum of fifteen thousand dollars. "Plaintiffs [the complaint proceeds] have been compelled to expend the further sum of six hundred dollars for medical attendance upon plaintiff Elizabeth Jones' said injuries, and

the further sum of three hundred dollars for the attendance of a nurse."

Defendant's motion for a nonsuit was denied, and the cause submitted to the jury for decision upon the evidence of plaintiffs alone.

The motion for nonsuit was properly denied. It is true that when the evidence is unconflicting the question of contributory negligence is often one of law for the court, rather than one of fact for the jury. But if the court is not satisfied that the evidence, as matter of law, establishes the contributory negligence of the plaintiff, or if it believes that under the evidence touching the conduct of plaintiff reasonable minds might differ upon the question whether or not he was negligent, then the question at once returns to the domain of fact, and the duty of the court is to allow the jury to solve it as a fact.

The evidence disclosed that the occupants of the buggy were driving upon the proper side of the roadway. They saw a pile of lumber in front of them which projected into the street. They could have driven, and did drive, with safety around this first pile, but there was a succession of piles beyond of which they were in ignorance. The nearest pile shut out their view. The defendant's mill made considerable noise. Only upon driving around the first pile did they see the other piles, and for the first time noticed the approaching train. The engineer then, too, first observed them. They were thus caught in a position where they could neither advance nor retreat, nor cross the track with safety, and where they could not move to the roadside away from the approaching train, because of the obstructing lumber. They tried to get into a passage or driveway between the lumber piles, but could not succeed. As the engineer testified, they were shut in a box.

Under these facts, which are no more strongly stated than the evidence warrants, the question of contributory negligence was properly left to the jury.

2. That the defendant was guilty of negligence admits of no doubt. One who maintains any unauthorized obstruction upon a highway by means of which another, through no fault of his own, is injured in person or property, is responsible in damages therefor. It is claimed, however, that the evidence did not show that the defendant owned or maintained the lumber piles. But it did show that defendant operated a planing mill, and that the lumber was piled upon its premises projecting into the street. "It was from the front of the mill north along the outside of the sidewalk." It was in evidence, also, that defendant owned this lumber, and immediately after the accident commenced to remove it. This, in the absence of any counter-showing, was clearly sufficient. For, the possession and ownership of the property being thus established, it will not be presumed that its location was without the knowledge or contrary to the wishes of the owner. For these reasons the instructions bearing upon this proposition were properly refused.

3. An ordinance of the city of San Jose was introduced, declaring it a misdemeanor for any person to place, erect, or maintain an obstruction upon any of the streets of the city. The court instructed the jury as follows: "The failure to comply with a municipal ordinance, or to perform a duty which is imposed by a municipal ordinance, is negligence in itself. Therefore, if you find that the defendant, at the time of the alleged accident, was obstructing the said Fourth street in the manner alleged, in violation of an ordinance of the city of San Jose, that in itself establishes negligence upon the part of the defendant, and it is not necessary that the plaintiffs make any further showing of negligence in defendant in order to recover."

Appellant criticises this instruction, using the language of the supreme court of Oregon: "To say that the mere fact of the violation of the ordinance is conclusive evidence of negligence, is negligence *per se*, without regard to the conduct of the plaintiff, or the duty

imposed upon him under the circumstances, would be to relieve him of the consequences of his acts, when they contribute to the injury, and result in an unjust liability upon the defendant." (*Beck v. Vancouver Ry. Co.*, 25 Or. 32.)

That the failure of any person to perform a duty imposed upon him by statute or legal authority is sufficient evidence of negligence has been repeatedly declared by this court. (*Siemers v. Eisen*, 54 Cal. 418; *Driscoll v. Market Street etc. Ry. Co.*, 97 Cal. 553; 33 Am. St. Rep. 203.) But the principle has this very obvious limitation: The act or omission must have contributed directly to the injury, or, however improper or illegal it may have been in the abstract, no action for damages can be founded upon it. The failure of a locomotive engineer to sound his bell or whistle before crossing a highway would be essentially negligent, but a totally deaf traveler, upon the highway, could in no way have suffered from the omission, and, as to him, it would not be negligence. So, too, the requirement of a night light to warn the public of a temporary obstruction upon a street would not advantage a man absolutely blind, and the failure to maintain it would not, as to him, be negligence. But, with an exceptional case, such as the foregoing, the court was not dealing, and, under the facts presented, we do not think the objection that the instruction eliminated from consideration the "conduct of the plaintiff or the duty imposed upon him," or, in other words, the question of his contributory negligence, is well taken. For, in the first place, the instruction declares the defendant to be negligent only if obstructing the street "in the manner alleged," which manner, as alleged, directly contributed to the accident. In the second place, the instruction, which is one of a series, cannot fairly be torn from its context for criticism, and the instructions, as a whole, show that the jury was fully instructed upon the doctrine of contributory negligence; the court saying, among other things: "An ob-



struction cannot be complained of by a party who fails to exercise ordinary care and prudence in avoiding it."

4. The court admitted evidence over defendant's objection of the husband's necessary disbursements for physicians and nurses in attending his wife, and, likewise, instructed the jury upon the subject. This, it is claimed, was error.

The action was, primarily, one for the recovery of damages for injuries done to the wife; and, though the right of action and the damages recovered are community property, this form of action is an exception to the rule that the husband has control of the community property and may sue or be sued alone where it is concerned. The wife is a necessary party. (*Tell v. Gibson*, 66 Cal. 247; *McFadden v. Santa Ana etc. Ry. Co.*, 87 Cal. 464.) The husband has a separate action for consequential damages to him for his wife's injuries, in which are included loss of service and expenses incurred looking to her recovery. In this action the wife is neither a necessary nor a proper party. The two causes of action cannot with us be joined in one suit, though the practice is elsewhere permissible. (Addison on Torts, 952.) The complaint was, therefore, open to demurrer for improper joinder of causes of action. (Code Civ. Proc., sec. 430, subd. 5.) The defendant failed to avail himself of his right to demur, and made no objection to the complaint until evidence was sought to be introduced in support of these averments. His objection, then for the first time made, came too late. Having failed to demur he is conclusively deemed to have waived the objection. (Code Civ. Proc., sec. 434.)

The instructions, the refusal to give which is complained of, were either properly refused, or were covered by those given of the court's own motion.

The judgment and order appealed from are affirmed.

TEMPLE, J., and MCFARLAND, J., concurred.

Hearing in Bank denied.

[L. A. No. 87. Department One.—December 18, 1895.]

**IN THE MATTER OF SAM RAMAZZINA ET AL., CO-  
PARTNERS UNDER THE FIRM NAME AND STYLE OF  
RAMAZZINA BROTHERS, AN INSOLVENT DEBTOR.**

**INSOLVENCY—PARTNERSHIP—SUFFICIENCY OF PETITION—JURISDICTION.—**

Although a petition in insolvency by partners does not directly allege that the petitioners are partners, the absence of such direct allegation is not jurisdictional, where the fact sufficiently appears that they are partners, taking the petition as a whole.

**ID.—APPEAL BY CREDITOR FROM ADJUDICATION—SUFFICIENCY OF PLEADING.—**Upon appeal by a creditor from an adjudication in insolvency upon petition of insolvent partners, any crudities or bad grammar used by the petitioner are not fatal to the jurisdiction, and will not vitiate the pleading.

**ID.—SHOWING OF INSOLVENCY—VALUATION OF PARTNERSHIP ASSETS—EXCESS OF PARTNERSHIP ASSETS OVER LIABILITIES.—**The fact that it appears from the petition that the valuation of the partnership assets exceed the liabilities of the partnership, does not prove the solvency of the copartners at the time of the filing of the petition; and where the petition discloses that the partners individually are hopelessly insolvent and unable to pay the debts and liabilities of the partnership, the petition sufficiently discloses insolvency within the purview of the Insolvent Act.

**ID.—DEBTOR, WHEN INSOLVENT.—**A debtor is insolvent when he is unable to pay his debts from his own means as they become due.

**APPEAL** from an order of the Superior Court of Santa Barbara County adjudging the insolvency of Ramazzina Brothers, copartners. W. B. COPE, Judge.

The facts are stated in the opinion of the court.

*Nichols & Storke*, for Appellant.

Insolvency proceedings are special, and everything in support of the jurisdiction must appear affirmatively. (*Hastings v. Cunningham*, 39 Cal. 142; *Vermont Marble Co. v. Superior Court*, 99 Cal. 579.) As the petition does not allege that the petitioners were partners, the court had no jurisdiction to adjudge them both insolvents in the same proceedings. (Insolvent Act, 1880, sec. 35.) A party whose assets are forty per cent above his liabilities cannot be said to be insolvent. (*Hunt v. His Creditors*, 9 Cal. 46.)

*Slade & Armstrong*, for Respondent.

If the individual names of partners are given in the title of a cause, followed by the word "partners," the names need not be repeated in the body of the complaint or petition. (*King v. Bell*, 13 Neb. 409; *Wright v. Cohn*, 88 Cal. 328; *Hallock v. Jaudin*, 34 Cal. 167, 174; *Alpers v. Schammel*, 75 Cal. 590; *Wise v. Williams*, 72 Cal. 544.)

GAROUTTE, J.—This is an appeal by a creditor from an order of the superior court adjudicating the above-named parties insolvent debtors. It is claimed that the court had no jurisdiction to make the order, by reason of fatal defects appearing upon the face of the petition.

It is first insisted that the petition does not show that petitioners are partners, but we think that fact sufficiently appears when the entire petition is considered. While a direct allegation to that effect would have been good pleading, yet its absence is not jurisdictional, if the fact fairly appears taking the petition as a whole. Further complaint is made that the petition is ambiguous, indefinite, and unintelligible. While it may well be said to be somewhat crude in many respects, still crudities are not fatal to jurisdiction, and bad grammar used by a pleader does not vitiate a pleading.

It is also insisted that the copartnership of Ramazzina Brothers was not insolvent at the time of the filing of said petition, as shown by a comparison of its assets and liabilities appearing therein. While it does appear therefrom that the valuation of the partnership assets exceeds considerably the liabilities of the partnership, yet the petition further discloses that the partners individually are hopelessly insolvent. The petitioners further allege directly that they are insolvent, and the mere fact that the assets in value exceed their liabilities does not prove solvency. Such fact might exist, and often does exist, and still a debtor be entirely insolvent within the purview of the Insolvent Act. A debtor when he is unable to pay his debts from his own means

as they become due, is insolvent. (*Washburn v. Huntington*, 78 Cal. 573; *Sacry v. Lobree*, 84 Cal. 41.)

The order appealed from is affirmed.

HARRISON, J., and VAN FLEET, J., concurred.

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[L. A. No. 64. Department One.—December 18, 1895.]

**BAILEY LOAN COMPANY, RESPONDENT, v. HENRY  
G. HALL ET AL., APPELLANTS.**

**PARTNERSHIP—ACTION UPON NOTE—JUDGMENT BY DEFAULT AGAINST PART OF DEFENDANTS.**—In an action upon a partnership note against three persons charged to have constituted the partnership, whose name is signed to the note, judgment may be entered by default against two of the defendants, although the action does not prevail as to the third defendant.

**ID.—SEVERAL JUDGMENT—JOINT CONTRACT—CHANGE OF COMMON LAW—CONSTRUCTION OF CODE.**—Section 578 of the Code of Civil Procedure, which authorizes a judgment to be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, abrogates the rule at common law that, in an action upon a joint contract, the plaintiff must recover against all or none; and the rule established by that section includes as well cases in which some of the defendants have made default, as cases in which all of the defendants have appeared and answered, the only limitation being that in case of default the relief shall not exceed that which the plaintiff shall have demanded in his complaint.

**ID.—SEVERAL LIABILITY OF PARTNERS.**—The liability of partners upon a partnership note is several, as well as joint, and in a prayer for judgment upon such note against the defendants, the court is authorized to enter a several judgment against any of them.

**APPEAL** from a judgment of the Superior Court of the County of Los Angeles. LUCIEN SHAW, Judge.

The facts are stated in the opinion of the court.

*J. S. Chapman*, for Appellants.

A judgment by default cannot give relief beyond that which is demanded in the complaint. (*Raun v. Reynolds*, 15 Cal. 459; *Gage v. Rogers*, 20 Cal. 91; *Lamping v. Hyatt*, 27 Cal. 102; *Gautier v. English*, 29 Cal. 168; *Par-*

*rott v. Den*, 34 Cal. 79.) The three defendants being sued jointly as copartners, the clerk had no authority to enter judgment by default against two of them. (*Curry v. Roundtree*, 51 Cal. 184, 186; *McCord v. Seale*, 56 Cal. 262.)

*Finlayson & Finlayson*, for Respondent.

When it was determined by the court that Everett E. Hall was not a member of the firm of H. G. Hall & Sons, the court had express statutory authority to enter judgment against the two remaining defendants, who, by their default, had admitted the allegations of the complaint to be true. (Code Civ. Proc., sec. 578; *Stoddart v. Van Dyke*, 12 Cal. 438; *Rutenberg v. Main*, 47 Cal. 214; *Gruhn v. Stanley*, 92 Cal. 86; *Willis v. Morrison*, 44 Tex. 27; *Congdon v. Monroe*, 51 Tex. 109; *Stevens v. Gainsville Nat. Bank*, 62 Tex. 499, 501; *Keithley v. Seydell*, 60 Tex. 78, 83; *Brugman v. McGuire*, 32 Ark. 733, 740; *Silvers v. Foster*, 9 Kan. 56; *Smith v. Straub*, 41 Kan. 7; *Wiggins v. Lewis*, 12 Cush. 486; *Bibb v. Allen*, 149 U. S. 481; 17 Am. & Eng. Ency. of Law, 1327; 1 Black on Judgments, sec. 208; Pomeroy's Remedies and Remedial Rights, secs. 289-92; *Austin v. Appling*, 88 Ga. 54; *Anderson v. Fort Worth etc. Assn.* (Tex. App., Nov. 6, 1889), 14 S. W. Rep. 1016.) An action may be brought either against all the partners, or against each or one of them. (Pomeroy's Remedies and Remedial Rights, sec. 305; *Snow v. Howard*, 35 Barb. 55.)

HARRISON, J.—The complaint in this action sets forth certain promissory notes, purporting to have been made to the plaintiff by "H. G. Hall & Sons," and the plaintiff brought the action against three defendants, who are alleged by it to have constituted a partnership by that name, and to have executed the notes to it. Two of the defendants, the appellants herein, suffered default, and the other defendant answered the complaint, denying that he was a member of the firm at the time the notes were executed. The cause was tried by the court

without a jury, and a judgment rendered in favor of the plaintiff, and against the appellants, and in favor of the defendant who had answered the complaint. The defendants against whom judgment was rendered have appealed upon the ground that, as the action was brought upon a partnership obligation against three defendants, the court was not authorized to enter a judgment by default against two only. The record is presented here upon the judgment-roll alone.

Section 578 of the Code of Civil Procedure provides: "Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants." In *Lewis v. Clarkin*, 18 Cal. 399, it was held that by this section the rule at common law, that in an action upon a joint contract the plaintiff must recover against all or none, was abrogated, and that in such action the plaintiff was entitled to a judgment against those defendants merely who were shown to be liable upon the obligation. (See, also, *People v. Frisbie*, 18 Cal. 402; *Shain v. Forbes*, 82 Cal. 583; *Harrington v. Higham*, 15 Barb. 524; *McIntosh v. Ensign*, 28 N. Y. 169.) The terms of this section do not limit the rule to actions in which the defendants have appeared and answered, but include as well those in which some of the defendants have made default, the only limitation in such case being that found in section 580, that the relief shall not exceed that which the plaintiff shall have demanded in the complaint. In *Randall v. Hunter*, 69 Cal. 80, an action was brought against the defendants as partners upon a promissory note, signed "Gill and Hunter." Gill suffered default, and Hunter defended upon the ground that the note was an individual obligation of Gill. Upon the trial this defense was not sustained, and judgment was entered against both. Hunter appealed, and a motion by the plaintiff to dismiss the appeal for failure of Hunter to serve his codefendant was denied upon the ground that Gill would not be affected by a reversal of the judgment, and to the argument that another trial might result in a several

judgment against Gill, whereas he was then interested in preserving the joint judgment and preventing a several judgment, the court said: "His default admits that he is bound severally as well as jointly. If, on the trial which has taken place, the verdict had passed in Hunter's favor, a judgment by default might have been entered against Gill severally."

The appellants herein made default to the plaintiff's complaint, and thereby admitted the truth of its allegations, and consented to a judgment giving to the plaintiff all the relief he had prayed for. They admitted that they were members of the partnership of "H. G. Hall & Sons," and that the notes set out in the complaint had been executed to the plaintiff by that partnership. These facts, whether admitted by their default, or established by evidence at the trial, entitled the plaintiff to a judgment against them. It is immaterial to them that their codefendant was able to show at the trial that he was not a member of the partnership, and thus to defeat the plaintiff's right of recovery.

It was not necessary that the judgment should run against the appellants as copartners. The notes upon which the action is brought are several, as well as joint, and the prayer of the complaint is for a judgment "against said defendants" for the amount of said notes. The court was thus authorized to enter a several judgment against the appellants, and the judgment entered is in accordance with the prayer of the complaint.

The judgment is affirmed.

GAROUTTE, J., and VAN FLEET, J., concurred.

[L. A. No. 32. Department One.—December 18, 1895.]

**IN THE MATTER OF THE ESTATE OF PIERRE CLOS,  
DECEASED.**

**ESTATES OF DECEASED PERSONS—ACCOUNTS OF EXECUTOR—NECESSARY REPAIRS AND IMPROVEMENTS.**—Although, as a general rule, executors and administrators are not required nor permitted to make permanent improvements upon the property of the estate in their charge, in the way of erecting new buildings and structures; yet that rule does not apply where repairs and improvements are absolutely necessary to keep the premises in good tenantable condition, and the improvements are rendered necessary by the requirements of a city ordinance over which the executrix has no control, and were made in good faith to the increase of the value of the property; and, in such case, the executrix should be allowed for the repairs and improvements upon the real estate belonging to the estate

**ID.—PRINCIPLE OF EQUITY—REASONABLE EXPENDITURES BY EXECUTOR.**—Where the estate has received the full benefit of expenditures, which have been reasonably made by an executrix, it is inequitable to hold that the executrix is not entitled to reimbursement; and the acts of an executor or executrix in the administration of the trust are to be adjudged according to the rules and principles of equity.

**ID.—PERMISSION OF COURT—ALLOWANCE OF ACCOUNT.**—Although it is better practice for an executor first to procure the permission of the probate court to make a needed improvement, before proceeding thereto, yet this is not an indispensable condition to the allowance of the demand in the settlement of the executor's account, where it appears that the expenditures were just and reasonable, and were made in the interest of the estate.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. W. H. CLARK, Judge.

The facts are stated in the opinion of the court.

*McKeeby & Appel*, and *J. Brosseau*, for Appellant.

The executrix had power to make the improvements in question. The only measure of her duty was to act with fidelity, and with that degree of prudence and diligence which a man of ordinary judgment would be expected to bestow upon his own affairs of a like nature. (Code Civ. Proc., sec. 1452; *Estate of Rose*, 80 Cal. 166; *Estate of Moore*, 96 Cal. 522.)



*George D. Blake, for Respondent.*

The allowance or disallowance of expenditures by an executrix without the order or consent of the court, is within the discretion of the court, and will not be reviewed at all unless it is clear that the discretion has been abused, and the burden of proving the necessity of the expenditures is on the executrix. (*In re Moore*, 88 Cal. 1; *Fuller v. Fuller*, 23 Fla. 236.)

VAN FLEET, J.—Among the items of the account filed by the executrix of the estate were these:

“By payment to Frank J. Capitan, for architectural services, general contract, brick work, plumbing, etc., for repairing and building stables at No. 24 Aliso street. . . . \$2,611.74  
“By services of said Capitan for preparing plans for said building. . . . . 130.53”

Upon the settlement of the account the court below rejected and disallowed these items, upon the ground, as stated in the bill of exceptions, “that the said items were not a proper charge of the said executrix against the said estate”; and the only question involved in the appeal, which is taken by the executrix, is the propriety of the action of the court in that regard.

The evidence in support of the rejected items was wholly uncontroverted, and was, in substance, this:

The executrix testified: The estate is the owner of an undivided one-half of certain premises situate at Nos. 24 and 26 Aliso street. I am the owner of the other undivided one-half in my own right. At the time of the death of Pierre Clos, and long prior thereto, on a part of the premises, to wit, the yard immediately back of the front of the said building, which front part is used as a lodging-house and saloon and restaurant, there were some structures used as stables, which had been built a great many years before the death of Pierre Clos, my husband, and the structures were old and decayed, and had been repaired from time to time. The stalls for horses, and the sheds for carriages, had no

flooring. The roofs were of poor material. There were no brick walls inclosing the stable, and there was an adobe wall on the east side, which had been built there for years, and had been broken down, and was nearly tumbling over. The stables were inclosed by an adobe wall, and partly by a picket fence. The picket fence was old and rotten, and the adobe wall had been partly torn down by the water which had accumulated in the yard, and forced itself into the premises of the occupants of the surrounding property. There was no sewerage on the premises, and when it rained the water accumulated there, and rendered the place very muddy, and almost unfit for the occupation of the premises as a stable. The roofs over the stalls were in such condition that whenever it rained the horses would get wet, and the stalls rendered unfit for occupation. From time to time there were a great many complaints made to me by the neighbors, and the authorities of the city of Los Angeles also made complaint to me that the premises were a nuisance, and that they had to be repaired, or the stables abandoned and removed. The stench was of such character that it made all the neighbors complain, and was almost unbearable. I had been paying considerable money for repairing the premises from time to time, but every year they had to be repaired over and over again, and my tenants who occupied the lodging-house and the saloon immediately above and in front of the stables, threatened to leave the place unless I repaired it in such a way that the water would have an outlet, and the stables were fixed in such a condition that they would keep perfectly free and clean from unbearable smells or odors. Mr. Valdez, who was then occupying the premises for stables, complained to me from time to time, and finally, in 1890, during the rainy season, he notified me that he would leave the premises unless I repaired them. I consulted a number of architects and builders, who gave me estimates in reference to the cost and expense of repairing the stables, and Mr. Capitan gave me the lowest bid. I wanted simply

to repair the stables with lumber, and to put on shingle roofs, but that part of the city where the stables are situated was included within the exterior limits fixed by the fire ordinance of the city of Los Angeles, and by that ordinance I could not put up a frame building or frame structure, or any repairs built of lumber, without the permission of the city authorities, and they absolutely refused to allow me to make the repairs in any other manner than as I repaired them. I was required to build fire walls, and to put on fire-proof roofs over the stables. The stalls had to be built over again, as well as flooring put into them, so that they could be kept clean, and free from odors or bad smells. The carriage repository also had to be rebuilt, and that was built of metal and iron, as well as the hay barn. The whole work was done well and skillfully, and was cheap at the price I paid. The two items, to wit, the sums of two thousand six hundred and eleven dollars and seventy-four cents, and of one hundred and thirty dollars and fifty-three cents, appearing in my account as having been paid to Mr. Capitan, were paid for one-half the work done in repairing and constructing the stables, the total sum being five thousand four hundred and eighty-four dollars and fifty-four cents, the other half being paid by me. The work I considered absolutely necessary so as to keep up the premises as a stable. The front part of the lot is only about thirty-eight feet, and this space is taken up with an entrance to the back yard of the lot, which is used as a stable, and a small portion as an entrance to the saloon, which is built running into the lot from the front of the building, so that the lot is very wide at the rear, with a very narrow frontage, and could not have been kept for any purpose except a stable. The premises had been occupied as a stable for years back, as far as I can remember, and it was a well-known stand as a stable, and could not have been rented for any other purpose. If I had not repaired the stable, and had left the old sheds and old rotten lumber upon the premises, the saloon, restaurant,

and lodging-house could not have been kept rented, by reason of the bad condition of the premises. Since I repaired the stables they have been constantly rented, and have produced good rents. So has the saloon and the lodging-house. The insurance on the premises has been reduced considerably, and the property is of far greater value by reason of the building of the stables as they are now than it was before. I could not have received any rent from the premises except by doing the work that I did do.

The architect testified: I was the architect and supervised the building of the stables at No. 24 Aliso street for the executrix. I saw the stables as they stood there before I did the work. They were totally unfit to be occupied as a stable, both from a sanitary point of view and from a financial point of view. I do not believe the stables, as they stood there before my work was done, should have been kept for stable purposes. The stalls were old and rotten. The roofs were tumbling down and were decayed. The floors were all of mud, and were in such a condition that a person could not retain his health and work on the premises. When it came to figuring how the stable should be rebuilt we were confronted by the city ordinance of the city of Los Angeles, which would compel us to put on fire-proof roofs and fire-proof walls, and extend them up on three sides to conform to the requirements of the city ordinance. I figured on the work and put it down as low as possible. The work had to be done, or else the stables had to be abandoned. I consider the expenditure an absolutely necessary one and very reasonable. The work is fully worth the money. The stable could not be built in any other manner than as we built it. I have heard the statement by the executrix here in court, and I consider it a fair, full, and true statement of the circumstances under which these stables were built. The work renders the place a pure, healthy, clean business place, and I consider that the value of the premises has been greatly added to by the work.

Mr. Valdez testified: I was occupying the premises for a number of years. I was there when the repairs were made. I considered that the stables could not have been repaired in any other manner than they were repaired. The work was absolutely necessary, and the price paid for repairing the stables is reasonable. I never saw the premises kept for any other purpose than for stable, saloon, lodging-house, and restaurant. The front part of the lot is narrow, and the back part is very wide. Aliso street is not fit for anything else than stables, lodging-houses, saloons, and restaurants. It is in that part of the city which is next to wholesale houses, and it is not a residence portion of the city. The lodging-houses are occupied by workingmen generally. Aliso street is a thoroughfare for people residing east of the city out in the country, and these premises were occupied as a stable for a great many years. Before the repairs were made the property was absolutely in a totally unfit condition for use. The roofs were old and decayed, were tumbling down, and it was dangerous to leave horses at night in the stables whenever it was rainy, or when it was windy, for fear they would be killed. There was no place to keep carriages, for fear the water would pour on them and damage them. The floors were in a muddy condition, and a person would have to wade through the mud and water to get to the stalls and carriages, and carriages and horses could not be kept clean. I made several complaints to Mrs. Escallier that the premises had to be repaired or I should move. The neighbors were complaining of the bad odors and smells arising from the premises. I was threatened with suits for maintaining nuisances. The stables were repaired from time to time, until, in 1890, I made up my mind to leave the premises or have them repaired. So I notified Mrs. Escallier.

Mr. Sabichi, the agent of the executrix for the buildings, testified: I know the premises in question. I know when the repairs were made. I was her agent at the time. I consulted with a number of architects and

builders as to the proper manner of repairing the stables. The repairs were absolutely needed, and, after consulting with them all, I thought that the bid put in by Mr. Capitan was the lowest and most reasonable. I have examined the work done, and I consider it very good, and the value of the property greatly added to by the work done.

It does not clearly appear from the record upon what ground the learned judge of the court below based his action in the premises, as no specific findings were made, and the only reason stated is the general one found in the order settling the account, that the rejected items were not proper charges against the estate. From expressions in the brief of respondent, however, we infer that the items were disallowed because the court adopted the view now taken by the respondent that the alterations made in the building in question were deemed to be more in the nature of the erection of a new building than the repair or improvement of an old one, and that such expenditure was not for that reason the subject matter of a proper charge against the estate.

It is perfectly true, as a general proposition, that executors and administrators are not required nor permitted to make permanent improvements upon the property of the estate in their charge, in the way of erecting new buildings or structures, and that expenditures made for such purposes will not be allowed; and the only question is whether that rule in its strictness should be applied to the facts of this case. We are constrained to think that it should not. If the case were one where the executrix had proceeded to erect buildings or other permanent improvements upon a vacant lot or unoccupied piece of land of the estate, it would no doubt fall strictly within the rule contended for. But such is not this case. Here the intention and purpose of the executrix was to improve and put in repair premises for many years devoted to a particular use, and from which the estate was deriving an income, for the purpose of keeping those premises from being

abandoned, and the income being lost to the estate. The statute made it her duty to "keep in good, tenantable repair all houses, buildings, and fixtures" upon the real estate belonging to the estate. (Code Civ. Proc., sec. 1452.) The repairs in this instance, it is true, involved practically a rebuilding of the structure rather than a repair thereof in its strict sense, and perhaps in a purely legal sense, and for other purposes, would be so considered. But the extensive character of the work done would seem to have been largely rendered necessary by the requirements of the city ordinance—a matter over which the executrix had no control.

No question is made of her perfect good faith in the premises, and it appears that by the repairs and improvements made the property has been largely enhanced in value, and has been bringing in a steady income since the completion of the alterations made; of all which the estate has had the benefit. The work appears to have been done only after taking the advice of competent builders as to the best method to pursue in making the repairs rendered necessary; and that the work was well done, and the cost a reasonable one for the character of such work, no question is made. Under these circumstances, and it appearing that the estate has received the full benefit of the expenditure, we think it would be very inequitable indeed to hold the executrix not entitled to a reimbursement. And it is according to the rules and principles of equity that the acts of an executor had in the administration of his trust are to be adjudged. (*In re Moore*, 96 Cal. 528.) In that case, quoting from *Matter of Niles*, 113 N. Y. 556, the court say: "This matter of the administration of assets of the estate is peculiarly within the cognizance of equity, and the surrogate's court, in adjusting the accounts of executors and administrators, is governed by principles of equity as well as law. (*Upson v. Badeau*, 3 Bradf. 15.)

In the exercise of the statutory powers conferred upon him, to direct and control the conduct and settle the

accounts of administrators and executors, the surrogate is not fettered, nor is he prevented by any rule of law from doing exact justice to the parties. He is supposed to administer justice in each case within his jurisdiction according as the equities of the case demand, within the confines only of statutory provisions."

Judged by these principles, we think the work done in this instance should be held to be a repairing of the premises, within the meaning of the statute, the expenditure for which appellant should have been allowed in her account. It would have been better, perhaps, as it would in any case, had the executrix first procured the permission of the probate court to make the contemplated improvement before proceeding thereto; but this is not an indispensable condition to the allowance of the demand in her account, where it appears that the expenditures were just and reasonable, and have been made in the interests of the estate. (*Estate of Moore*, 88 Cal. 1.)

It follows that the order should be reversed and the cause remanded with directions to the court below to modify its order by allowing the rejected items. It is so ordered.

HARRISON, J., and GAROUTTE, J., concurred.

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[No. 15975. Department One.—December 18, 1895.]

CONRAD KIRSCHNER, ADMINISTRATOR, ETC., RESPONDENT, v. JOSEPH E. DIETRICH, APPELLANT.

**DIVORCE—PERSONAL ACTION—ABATEMENT—DEATH AFTER JUDGMENT—JURISDICTION.**—An action to procure a judgment of divorce is a purely personal action, which cannot survive the death of either party, and where the plaintiff in such action dies subsequent to the entry of a judgment decreeing a divorce in her favor, the court is deprived of all power to review its action and determine her right to a divorce.

**ID.—PUBLICATION OF SUMMONS—APPLICATION TO ANSWER TO MERITS—CONSTRUCTION OF CODE.**—The fact that the summons in the action for divorce was served by publication, does not authorize the court to set aside a judgment of divorce, after the death of the plaintiff, to allow the defendant to answer to the merits of the action



under section 473 of the Code of Civil Procedure, as that section has no application to a case in which by the death of the plaintiff the action is abated, and all opportunity of controverting its merits has been removed.

**ID.—QUESTION OF PROPERTY—ABSENCE OF ISSUE—JURISDICTION TO OPEN JUDGMENT—REVIEW.**—The court has no jurisdiction to open the judgment of divorce, for the determination of property rights between the plaintiff and the defendant, after the death of the plaintiff, where the complaint, as well as the judgment, is silent upon the subject of property; and, in such case, there being no issue upon that subject, the action cannot be revived, for the purpose of having the rights of property adjudicated.

**ID.—EFFECT OF DECREE—COMMUNITY PROPERTY—TENANCY IN COMMON—INDEPENDENT ACTION.**—In the absence of any issue as to property rights, or any reference thereto in the decree of divorce, the parties to the suit become tenants in common of the community property; and the death of the plaintiff after the entry of judgment does not impair the right of the defendant therein; but this right must be enforced in an independent action, in which all who may have an interest therein should be made parties, and it cannot be determined by reopening the decree of divorce subsequent to the death of the plaintiff.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. J. M. SEAWELL, Judge.

The facts are stated in the opinion of the court.

*T. Z. Blakeman and Benjamin Healey*, for Appellant.

*Otto Tum Suden*, for Respondent.

**HARRISON, J.**—In an action for divorce against the appellant, brought by his wife, Filomen Dietrich, service of the summons was made by publication, and judgment of divorce was entered July 13, 1893. The plaintiff in the action died February 22, 1894, and on June 8, 1894, upon an *ex parte* motion in behalf of the defendant, the court ordered that the administrator of the plaintiff be substituted as plaintiff in place of the deceased, and directed that the action be continued in his name. Thereafter the defendant, upon notice to the administrator, moved the court to vacate the judgment, and that he be allowed to answer the complaint upon the grounds that the summons had not been personally served upon him; that the judgment was void, and that it had been pro-

cured by false testimony. The court denied his motion, and the present appeal is from that order.

It is difficult to understand upon what principle the court made the order substituting the administrator of the plaintiff in the place of his intestate, or directed a continuance of the action in his name after the death of the original plaintiff. But, as the respondent does not appear to have objected thereto, we are not required to determine the correctness of the order. The court, however, properly denied the defendant's motion to vacate the judgment, and allow him to answer the complaint. The action was solely for the purpose of procuring a judgment of divorce between the parties—a purely personal action which would not survive the death of either party, and which, upon the death of the plaintiff, could not be further prosecuted or defended, whether her death was before or after the judgment. If she had died prior to the entry of judgment, there could have been no judgment in the case, and her death subsequent to the entry of judgment deprived the court of all power to review its action, and determine her right to a divorce. The action having been brought to change the personal *status* of the plaintiff in her relations toward the defendant, it is evident that, upon the termination of her life, there was no personal *status* which a judgment could change.

The provision of section 473 of the Code of Civil Procedure, under which the appellant made the present motion, authorizing the court to allow a defendant, in case he has not been personally served with the summons, to answer to the merits of the original action within a year after the rendition of judgment therein, implies that at the time of his application there shall be an action still pending (Code Civ. Proc., sec. 1049), to the merits of which there can be an answer. The section has no application to a case in which, by the death of the plaintiff, the action has abated, and all opportunity of controverting its merits has been removed.

The effect of the plaintiff's death upon the action is not changed by reason of the question of property which is suggested by the appellant. The complaint, as well as the judgment, is silent upon the subject of property, and, although there is an allegation in reference thereto in the answer which the appellant proposed to file, this did not prevent the abatement of the action, nor is it stated in his notice of motion as one of the grounds upon which he would make it. The primary and substantive subject of litigation in a suit for divorce is the personal relation of the parties, and their rights to the community property is but incidental thereto. If, before a decision upon that question is made, one of the parties dies, the action cannot be continued for the purpose of determining the rights of property; and, if there was originally no issue upon the subject, it cannot be revived in case of death after judgment for the purpose of having this question adjudicated. In the absence of any reference thereto in the decree, the parties to the suit became tenants in common of the community property, and the death of the plaintiff after the entry of judgment did not impair the appellant's right thereto, but this right must be enforced in an independent action (*Godey v. Godey*, 39 Cal. 157), in which all who may have any interest therein should be made parties.

The order is affirmed.

GAROUTTE, J., and VAN FLEET, J., concurred.

[No. 15943. Department One.—December 18, 1895.]

CHARLES A. WARREN ET AL., RESPONDENTS, v.  
GEORGE W. HOPKINS ET AL., DEFENDANTS.  
LEOPOLD LOUPE, APPELLANT.

**APPEAL—MOTION TO DISMISS—SUPPLYING DEFECTS IN TRANSCRIPT.—**

Where a motion is made to dismiss an appeal upon the ground that the transcript is not properly authenticated, and that it fails to show that the notice of appeal had been served upon adverse codefendants, appellant may, under rule XV of the appellate court, which is to be liberally construed for the purpose of enabling the appellant to present his appeal upon the merits, remedy any defects or omissions of the transcript, and may supply at the hearing the proof of service of the notice of appeal.

**ID.—NOTICE OF APPEAL—PROOF OF SERVICE—PRACTICE—JURISDICTION.—**

The better practice is to have the proof of service of the notice of appeal made a part of the record in the court from which the appeal is taken, and, in such case, the record, when properly certified to this court, becomes conclusive evidence of the facts therein stated; but the jurisdiction of the appellate court does not depend upon proof of the fact of service being contained in the transcript, but upon the fact that the notice of appeal has been properly served; and the appellant may file in the appellate court either original proof of the service, or a certificate of the clerk of the court below that such proof has been made and filed in that court.

**ID.—LIEN UPON LOT FOR GRADING—CONSTRUCTION OF CODE.—**The lot upon which a lien is authorized by section 1191 of the Code of Civil Procedure for grading or other improvement of the lot, is not limited to any artificial subdivision or official designation of a lot upon a map, but includes in its meaning whatever territory is caused by the owner thereof to be graded under a single contract.

**ID.—CONTRACT FOR GRADING STREETS—PRIORITY OF MORTGAGE—GRADING OF BLOCK.—**Where a contract for grading streets in front of a block is made subsequent to the recordation of a mortgage upon the block, the lien for the grading of the streets is subordinate to the lien of the mortgage, though the mortgage may be subject to a lien for the grading of the block.

**ID.—FINDINGS—UNCERTAINTY—CONSTRUCTION IN SUPPORT OF JUDGMENT.—**Any uncertainty in the findings is to be construed so as to support the judgment rather than to defeat it; and a finding that a certain amount was unpaid under contracts for grading blocks and streets surrounding the same, and does not find that any portion of the unpaid sum was for grading the streets, must be read as a finding that the entire amount is due upon the contract for grading the blocks as against the holder of a mortgage upon one of the blocks, and where such mortgagee has not assigned any error in the finding, it must be presumed to be authorized by the evidence, and to be of such a character as to sustain the judgment.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. JAMES M. TROUTT, Judge.

The facts are stated in the opinion of the court.

*John J. Roche, and Page & Eells*, for Appellant.

No cause of action was shown, because plaintiffs had not complied with section 1188 of the Code of Civil Procedure, requiring them to designate in their claim of lien the amount due to them on each block. Unless the claim of lien follows the statute the suit cannot be maintained. (Code Civ. Proc., sec. 1191; *Wood v. Wrede*, 46 Cal. 637; *Hooper v. Flood*, 54 Cal. 218.)

*J. C. Bates*, for Respondents.

Section 1183 of the Code of Civil Procedure does not give a contractor any lien for grading blocks or improving streets. Section 1188 has reference only to liens under section 1183, which applies to the whole state, and not to a lien under section 1191, which has reference to incorporated cities. (*Kreuzberger v. Wingfield*, 96 Cal. 252.) Notice of appeal should have been served upon Hopkins and Bowie, as they were adverse parties under sections 938 and 940 of the Code of Civil Procedure. As that was not done, the appeal should be dismissed. (*Harper v. Hildreth*, 99 Cal. 267, and cases cited; *Masterson v. Herndon*, 10 Wall. 416; *Hardee v. Wilson*, 146 U. S. 181, and cases cited.)

HARRISON, J.—The plaintiffs brought an action upon a contract made by them with the defendant Hopkins, for grading outside land blocks 664 and 665 in San Francisco, and to enforce a lien upon the land for such grading, and subsequently brought another action upon a contract made by them with the defendants Hopkins and Bowie, for grading the streets in front of said blocks, and to enforce a lien therefor upon the same land. The appellant, Loupe, held a mortgage upon

block 664, executed to him by the defendant Hopkins subsequent to the date of the contract for grading the blocks, and, for that reason, was made a defendant in the actions, and filed answers therein, setting up his mortgage lien, and, in the latter action, filed a cross-complaint against the plaintiffs and Hopkins and Bowie for the foreclosure of his mortgage, claiming that the lien thereby created was superior to the lien of the plaintiffs. To this cross-complaint the plaintiffs filed an answer denying this priority of lien, and alleging that their claim for grading constituted a lien prior to that of the mortgage. Before the actions came on for hearing, judgments of dismissal were entered by consent of all parties as to block 665, and thereafter, upon an order of the court, made by consent of all the parties, the actions were consolidated and tried together. Prior to the trial Hopkins and Bowie stipulated with the plaintiffs as to the amount due and unpaid upon their contracts with them, and that judgment therefor might be taken. The cause was thereafter tried between the plaintiffs and the appellant upon the issue as to the priority of lien, and findings of fact were made and filed, and judgment entered declaring the lien of the plaintiffs superior to that of the appellant. The appellant moved for a new trial upon the ground that the evidence was insufficient to sustain certain findings of fact. His motion was denied, and from this order, and also from the judgment, he has appealed.

1. A motion was made on behalf of Bowie and Hopkins to dismiss the appeal upon the ground that the transcript filed herein was not authenticated, either by the attorneys or by the clerk of the superior court, and that it failed to show that the notice of appeal had been served upon them. Rule XV of this court provides that when notice has been given to the appellant of any objection to the transcript affecting the right of the appellant to be heard, "it shall be the duty of the appellant to present and file at the hearing of the cause such additional record, if such there be, to remove or

answer the objection or exception so taken." In compliance with this rule, the appellant, at the hearing of the cause, produced and filed a transcript properly authenticated by the clerk of the superior court, and has, therefore, obviated this objection of the respondents. (*Estate of Medbury*, 48 Cal. 83; *In re Wierbitszky*, 88 Cal. 333; *Woodside v. Hewel*, 107 Cal. 141.) The fact that it appears from the certified transcript that there were certain typographical and clerical errors in the one originally filed is immaterial. All that was essential to a review of the action of the superior court was contained therein, and, when served upon the attorney for the respondents, was received by him without objection. The object of rule XV is to enable the appellant to remedy any defect or omission of the transcript for the purpose of enabling him to present his appeal upon the merits, and is to be liberally construed for that purpose.

The appellant is required to furnish this court with a copy of the notice of appeal, and, although the statute requires that a copy of this notice shall be served upon the adverse party, there is no provision in the statute, or in the rules of this court, prescribing the mode in which such service shall be authenticated. The better practice is to have the proof of such service made a part of the record in the court from which the appeal is taken, in order that there may be evidence in that court that the judgment has been removed therefrom. In such cases that record, when properly certified to this court, becomes conclusive of the facts therein stated, and no extrinsic evidence will be received to contradict it. (*Boston v. Haynes*, 31 Cal. 107; *Boyd v. Burrell*, 60 Cal. 280.) If, however, the record, as certified to this court, is silent upon the fact of such service, that fact itself will not authorize a dismissal of the appeal. The jurisdiction of this court to hear an appeal depends upon the fact that the notice of appeal has been properly served, and not upon the proof of that fact being contained in the transcript; and, when an objection is

made that the transcript does not contain evidence of the service, the appellant will be allowed to make proof thereof. For this purpose he may file in this court either original proof of such service, or a certificate of the clerk below that such proof has been made and filed in that court. (*Knowlton v. Mackenzie*, ante, p. 183.) In conformity with this rule of procedure the appellant presented at the hearing, and filed as a part of the record of the cause in the superior court, a copy of an affidavit showing that the notice of appeal herein had been duly served upon the defendants Hopkins and Bowie, and a certificate of the clerk of that court that the original of said affidavit was on file in his office.

2. It is contended by the appellant that the notice of lien filed in behalf of the plaintiffs is defective for the reason that the contract for grading embraces two blocks of land, and that, under section 1188 of the Code of Civil Procedure, the claim of lien should have specified the amount due to them upon each block. The lien which is claimed by the plaintiffs is, however, authorized by section 1191 of the Code of Civil Procedure, and not that which is authorized by section 1183. Section 1191 gives to the contractor a lien upon the "lot" for his work done, while section 1183 gives him a lien upon the "building or other improvement"; and in *Davis v. MacDonough*, 109 Cal. 547, the "improvement" upon which a lien is authorized by section 1183 is held to refer to the objects enumerated in that section upon which the labor was performed, or for which the materials were furnished. "The buildings, mining claim, or other improvements" named in section 1188 have the same significance as in section 1183, and the clause in section 1191 giving to the contractor a lien upon the "lot" which he grades or fills, or "otherwise improves," refers to some improvement of the "lot" upon which the lien is given, rather than to the "improvements" upon the lot referred to in section 1183. While section 1188 requires the claimant who files a lien against two or more buildings, or other improvements, to designate



the specific amount for which he claims a lien upon each of such "improvements," it does not require him to make such designation unless there is in fact a specific amount due to him on each of such improvements, and it might frequently happen that a contractor would construct several buildings under one contract, and there would not be any specific amount due to him on each of such buildings. In the present case the plaintiffs made a single contract for the grading of the two blocks at a fixed price, and, as it appears that the character of the two blocks was such that the earth taken from one was to be used in filling up the other, and that the compensation for the entire work was fixed at "ten cents per cubic yard for filling," it is evident that there could be no separate amount chargeable against either block; and that, while the grading had the effect to improve the land, it did not constitute such "improvements" to the different blocks as are contemplated in section 1188, or for which separate liens were authorized. We are of the opinion, moreover, that the "lot" upon which a lien is authorized by section 1191 is not limited to any artificial subdivision upon the surface of the earth, or to any official designation upon a map, but that its meaning includes whatever territory is owned by a person which he may cause to be graded under a single contract. It sufficiently appears that, at the time of entering into the contract for the grading, Hopkins was the owner of all the land for which he employed the plaintiffs.

The appellant, however, contends that, as the contract for grading the streets in front of the blocks was made subsequent to the recordation of his mortgage, the lien therefor is subordinate to the lien of his mortgage, and that the court should have directed that the mortgage debt be paid prior to allowing the plaintiffs any compensation for grading the streets. As a proposition of law this contention is correct, but the record fails to authorize its application. The court finds the amount that was unpaid under the contracts for grad-

ing the blocks and the streets surrounding the same, but does not find that any portion of this unpaid sum was for grading the streets, and, as any uncertainty in the findings is to be construed so as to support the judgment rather than to defeat it (*Breeze v. Brooks*, 97 Cal. 72), this finding must be read as a finding that the entire amount was due upon the contract for grading the blocks. If the appellant would question the correctness of the judgment in this respect, it was incumbent upon him to make his objection in the court below when that court made its finding of the amount unpaid upon the plaintiffs' contracts. In his motion for a new trial the appellant has not assigned any error in this finding, and it must be not only assumed as authorized by the evidence, but of such a character as to sustain the judgment. By the dismissal from the controversy of all the land except the block covered by the appellant's mortgage, any evidence of the amount due to the plaintiffs upon the other block was irrelevant to the issues before the court, and it cannot be assumed that the court has considered such evidence in making its finding.

The motion to dismiss the appeal is denied, and the judgment and order are affirmed.

GAROUTTE, J., and VAN FLEET, J., concurred.

Hearing in Bank denied.

BEATTY, C. J., dissented from the order denying a hearing in Bank.

[No. 15978. Department One.—December 18, 1895.]

**CLARA HOWLAND ET AL., RESPONDENTS, v. OAKLAND CONSOLIDATED STREET RAILWAY COMPANY, APPELLANT. CONSOLIDATED PIEDMONT CABLE COMPANY, DEFENDANT.**

**NEGLIGENCE—COLLISION OF STREET RAILWAYS—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.**—In an action to recover damages from a collision of the cars of two street railways, where a verdict and judgment was passed in favor of the plaintiff against one of the street railway companies alone, a motion for a new trial of such street railway company upon the ground of newly discovered evidence, is properly denied, where the newly discovered evidence bears only upon the question of the relative degree of negligence of the two street railway companies, and does not tend to rebut or defeat plaintiff's right to recover from both of them, and presents evidence of the same general character, and to the same point, as much of the evidence adduced at the trial, and is not such as would render a different result upon a new trial reasonably probable.

**1D.—RESULT OF INJURIES—TESTIMONY OF PHYSICIANS—OPINION—EVIDENCE.**—Where a physician who treated the plaintiff for injuries caused by the collision of the street railway cars, and who subsequently attended plaintiff at the time of a miscarriage, testified that the miscarriage was, in his judgment, produced as the result of the injuries, a question asked of another physician who had been called in consultation too late to note personally the immediate character of the injuries, as to whether, assuming the statement of the other physician to be true, and the character of the injuries described by him to have been inflicted by a collision of the street cars, what, in his judgment, was the cause of the condition that he observed, does not improperly call for the opinion of one expert based upon that of another expert, but simply calls for the opinion of the witness as to the inducing cause of the condition in which he found the patient when called in, assuming the injuries to have been as described.

**1D.—EXPERT EVIDENCE—HYPOTHETICAL QUESTION—GENERAL OBJECTION—WAIVER OF SPECIFIC OBJECTIONS.**—An objection to a hypothetical question asked of a physician in the general form that it is irrelevant, immaterial, and incompetent, and not a proper hypothetical question, is insufficient to call the court's attention to the more specific objections that the question calls for the opinion of one expert based upon that of another, and that it should have contained a statement of the facts calling for the opinion; and the party making such general objections will not be permitted to avail himself upon appeal of specific objections which were not made in the court below.

**1I.—STATEMENT OF TESTIMONY HEARD BY EXPERT WITNESS.**—It seems that where an expert witness has heard a statement of facts testified to by another witness, it is sufficient, in putting to him a hypothetical question, to direct his attention to the testimony heard as the basis upon which his opinion is desired, without repeating the testimony.

**ID.—QUALIFICATION OF EXPERT WITNESS—DISCRETION OF TRIAL JUDGE.—**

The qualification of an expert witness to answer a hypothetical question calling for his opinion is a question largely for the determination of the trial judge, and his ruling will not be disturbed unless error clearly appears; and, where the witness disclosed a sufficient knowledge of the subject to entitle his opinion to go to the jury, the question of the degree of his knowledge goes more to the weight of the evidence than to its admissibility.

**ID.—OPINION EVIDENCE AS TO RUNNING OF ELECTRIC CARS.—**The manner of running electric-cars, their rate of speed, and the facility with which they can be stopped or handled, is a proper subject for expert evidence, and not a matter of such common knowledge that the jury can judge as intelligently as one skilled in their use.**R. RIGHT OF WAY BETWEEN STREET RAILWAY COMPANIES—EVIDENCE OF CUSTOM.—**Where the plaintiff was injured by the collision of two street railway companies, both of which were joined as defendants charged with negligence, the court may admit evidence, in behalf of one of the street railway companies, as to the custom between such companies of giving the older company the right of way at crossings, as tending to show the jury that the other defendant was guilty of the more culpable negligence.**L.—EXCESSIVE DAMAGES—PASSION OR PREJUDICE.—**Before the appellate court can interfere on the ground of excessive damages, the verdict must be so plainly and outrageously excessive as to suggest, at the first blush, passion or prejudice on the part of the jury.

**APPEAL** from a judgment of the Superior Court of the County of Alameda and from an order denying a new trial. **F. B. OGDEN**, Judge.

The facts are stated in the opinion of the court.

*Chickering, Thomas & Gregory*, for Appellants.

The lower court erred in not granting a new trial on the ground of newly discovered evidence. The newly discovered evidence was not cumulative, as it related to a distinct fact not proven at the trial. (*Kenezleber v. Wahl*, 92 Cal. 202; *Keeler v. Jacobs*, 87 Wis. 545; *Stackpole v. Perkins*, 85 Me. 298; *Waller v. Graves*, 20 Conn. 305; *Grogan v. Chesapeake Ry. Co.*, 39 W. Va. 415; *Bulkin v. Ehret*, 20 N. Y. Supp. 731; *Wineberg v. Sumps*, 33 Pac. Rep. 341 (Cal., June 9, 1893); *Van Tassel v. New York Ry. Co.*, 20 N. Y. Supp. 715.) The lower court erred in overruling the objections to the hypothetical questions propounded to the witness Stratton, upon the ground that

they obliged the witness to determine in his own mind the truth of the evidence he had heard (*People v. Lake*, 12 N. Y. 358; *Luning v. State*, 2 Pinn. 215; 52 Am. Dec. 153; *Elliott v. Russell*, 92 Ind. 526), and required him to give an answer based upon another person's opinion. (*Barber's Appeal*, 63 Conn. 393; *Link v. Sheldon*, 136 N. Y. 1; *Louisville etc. Ry. Co. v. Falvey*, 104 Ind. 409; *Reynolds v. Robinson*, 64 N. Y. 589; *Guiterman v. Liverpool S. S. Co.*, 83 N. Y. 358; *Williams v. State*, 64 Md. 384; Rogers' Expert Testimony, sec. 30.) The lower court erred in overruling the objection to the hypothetical question asked the witness McCarthy, for the reason that he had not shown himself sufficiently familiar with the mechanism of the car, or the condition of the brakes, to entitle him to testify as an expert. (*Senn v. Southern Ry. Co.*, 108 Mo. 142; *McKelvey v. Chesapeake etc. Ry. Co.*, 35 W. Va. 500; *Sappenfield v. Main Street etc. R. R. Co.*, 91 Cal. 48; *Kauffman v. Maier*, 94 Cal. 269; *Brunker v. Commins*, 133 Ind. 443; *Bergquist v. Chandler Iron Co.*, 49 Minn. 511; *Brooks v. Lincoln Street Ry. Co.*, 22 Neb. 816; *Overby v. Chesapeake etc. Ry. Co.*, 37 W. Va. 524; *International etc. Ry. Co. v. Kuehn*, 2 Tex. Civ. App. 210; Rogers' Expert Testimony, 26.) Nor was the subject one on which expert testimony could be introduced. Such questions should ordinarily be determined by the jury from ordinary experience and observation. (*Sappenfield v. Main Street etc. R. R. Co.*, *supra*.) Evidence as to the custom between street railroad companies of giving the older company the right of way at crossings was not admissible, as it would only be admissible to interpret a contract, and there was no contract between the companies in this case. (Code Civ. Proc., sec. 1870; *Burns v. Sennett*, 99 Cal. 363. See definition of "custom" in Bouvier's Law Dictionary and Abbott's Law Dictionary; Const., art. XII, sec. 17; Civ. Code, sec. 500; *Tilley v. County of Cook*, 103 U. S. 155.) Taking into consideration the fact that the cause of the miscarriage is at least doubtful, that all external marks of injuries shortly disappeared, and

that in the ordinary course of nature plaintiff would have undergone a period of pain and suffering, the damages awarded are so excessive as to appear to have been given under the influence of passion or prejudice. (*Lockwood v. Twenty-third Street Ry. Co.*, 7 N. Y. Supp. 663; *Jennings v. Van Schaick*, 13 Daly, 7; *Louisville etc. R. R. Co. v. Minogue*, 90 Ky. 369; 29 Am. St. Rep. 378; *City of Atlanta v. Martin*, 88 Ga. 21; *Missouri Pac. Ry. Co. v. White*, 80 Tex. 202.)

*Coogan & Foote*, and *F. E. Whitney*, for Respondents.

The granting of a new trial on the ground of newly discovered evidence is peculiarly within the discretion of the trial court, and its action should not be disturbed by appeal, unless the presumption that that discretion was properly exercised can be overcome by a clear want of facts. (*Heintz v. Cooper*, 104 Cal. 668; *People v. Loui Tung*, 90 Cal. 377; *Stoakes v. Monroe*, 36 Cal. 383.) Appellant cannot abandon the ground of objection taken to the hypothetical question asked witness Stratton on the trial below, and assume another on the trial after an appeal to the supreme court. If the objection could have been cured if the reason had been given to the court below, and it is not given, the supreme court will not notice the objection. (*Sweetland v. Shattuck*, 66 Cal. 31; *Roper v. McFadden*, 48 Cal. 346; *Stoddard v. Treadwell*, 29 Cal. 281; *Morgan v. Hugg*, 5 Cal. 409; *In re Garcelon's Estate*, 104 Cal. 570; 43 Am. St. Rep. 134.) The matter testified to by witness McCarthy was the proper subject for expert testimony, as the opinion of a witness may be given in a question of service or trade when he is skilled therein. (Code Civ. Proc., sec. 1870, subd. 9; *Jones v. Tucker*, 41 N. H. 546.) Whether he had qualified as an expert or not was a question for the trial court to definitely determine, and the ruling will not be reviewed. (*Sowden v. Idaho Quartz Min. Co.*, 55 Cal. 443; *Fairbank v. Hughson*, 58 Cal. 314; *Neal v. Neal*, 58 Cal. 287; *Nelson v. Sun Mut. Ins. Co.*, 71 N. Y. 453; *Jones v. Tucker*, *supra*; *Wright v. Williams*, 47 Vt. 222; *Dole v.*

*Johnson*, 50 N. H. 452; *Taylor v. Roger Williams Ins. Co.*, 51 N. H. 50; *Healy v. Visalia etc. R. R. Co.*, 101 Cal. 585.) Before the appellate court can interfere on the ground of excessive damages, the verdict must be so plainly and outrageously excessive as to suggest, at the first blush, passion or prejudice or corruption on the part of the jury. (*Wheaton v. North Beach etc. R. R. Co.*, 36 Cal. 590; *Wilson v. Fitch*, 41 Cal. 385; *Aldrich v. Palmer*, 24 Cal. 518.)

**VAN FLEET, J.**—Action for damages resulting from personal injuries.

The action was against both defendants, the injuries having resulted from a collision of the cars of defendants at a point where their roads crossed. Verdict and judgment were in favor of plaintiff, against the defendant Oakland Consolidated Street Railroad Company alone, and the latter appeals from the judgment and an order denying it a new trial.

1. The first point urged for a reversal is that the court below erred in not granting appellant a new trial upon the ground of newly discovered evidence. The evidence at the trial upon the question as to which one of the two defendants was guilty of the greater degree of negligence in bringing about the accident was conflicting, but that there was evidence tending directly to show negligence on the part of appellant there is no question. The newly discovered evidence, if it may be so regarded, bears only upon the question of the relative degree of negligence of the two defendants, and in no way tends to rebut or defeat plaintiff's right to recover from one or both of the defendants. While it may not be purely cumulative, it is largely of the same general character, and to the same point, as much of the evidence adduced at the trial, and, in any event, is not such as in our judgment would be likely to render a different result upon a new trial reasonably probable. Under these circumstances the court below was not only justified in deny-

ing the motion, but we think its ruling in that regard was clearly correct.

2. The evidence showed that about three months after the receipt of the injuries complained of, plaintiff, who was pregnant at the time of the accident, suffered a miscarriage, and the evidence tended to show that such miscarriage was a result of those injuries. Dr. Huntington, who treated plaintiff for the injuries, and subsequently attended her at the time of the miscarriage, was a witness in her behalf, and described to the jury the character of the injuries inflicted upon her, and testified in effect that, in view of her condition, and the character of the injuries which he described, it was his judgment that the miscarriage was produced thereby. Another physician, Dr. Stratton, who was present and heard the testimony given by Dr. Huntington, was then called as a witness for plaintiff, and testified that he had been called in consultation with Dr. Huntington at plaintiff's bedside, shortly before the miscarriage, but too late to note personally the immediate character of her injuries. After describing plaintiff's condition at the time he was so called, he was asked by plaintiff this question: "Assuming the statement made by Dr. Huntington to be true, and the character of the injuries he has described to have been inflicted by a collision of two street-cars, what, in your judgment, was the cause of the condition that you observed? Was it the accident, or any other cause?" The appellant objected to the question "as irrelevant, immaterial, and incompetent," which was overruled, and the witness answered that in his opinion the condition was due to the accident. The question was then repeated in a slightly modified form, thus: "Now, assuming again that Dr. Huntington's statement was true as to the character of the injuries which were inflicted, as I have stated, what, in your judgment, was the cause of the miscarriage, if there was a miscarriage?" To which appellant made the same objection as before, and, further, that it was not a proper hypothetical question. The objection was again overruled, and



the question received a like answer. These rulings are now assigned as error. It is said that the "statement" of Dr. Huntington to which the attention of Dr. Stratton is directed by the question, and upon which he is requested to base his opinion, necessarily included, not only the facts testified to by Dr. Huntington, but also the opinion of the latter based thereon, and that the question, therefore, called for the opinion of one expert based upon that of another, which it is claimed was improper. We do not think appellant's construction of the question a fair one, or that the language used would so strike the apprehension of the jury. The question may not be as free from ambiguity as it could have been made, but we think it sufficiently appears therefrom, and would be so understood, that what the witness was asked to base his opinion on was the facts stated by Dr. Huntington as to the injuries to plaintiff. This was made, indeed, quite clear by the question as put in its modified form. The construction contended for by appellant would seem to lead to an absurdity. He says it was equivalent to asking the witness: "Assuming that Dr. Huntington is correct when he states that the injuries caused the miscarriage, what, in your opinion, was the cause of the condition that you observed?" If such were to be taken as the sense of the question, we think it quite obvious that it could have done appellant no harm, since the answer would have been practically meaningless. But such is not its ordinary import. The witness had listened to the testimony of Dr. Huntington as to the injuries produced upon plaintiff's person, and he was asked, assuming the injuries to have been as described, to give his opinion thereon as to the inducing cause of the condition in which he found the patient at the time he was called in.

If, however, we were to assume that the question is open to the criticism now urged, we do not think the objection could avail defendant here, for the reason, as claimed by respondent, that it was not taken in the court below. The objection there was that the question

was "irrelevant, immaterial, and incompetent, and not a proper hypothetical question." This form of objection was entirely too general to call the court's attention to the particular vice now pointed out, and it is well settled that a party will not be permitted to avail himself in this court of a more specific objection than that made in the court below. Appellant should have pointed out the particular defect which rendered the question either incompetent, irrelevant, or immaterial, or wherein it was not a proper hypothetical question, that the objection could have been intelligently ruled upon, and, if necessary or proper, obviated. (*Colton etc. Co. v. Swartz*, 99 Cal. 284; *Crocker v. Carpenter*, 98 Cal. 421; *People v. Frigerio*, 107 Cal. 151.) The reason of this obviously just rule is well stated in the case of *Crocker v. Carpenter*, *supra*. There the objection in the trial court to certain offered evidence was the general one that it was irrelevant, incompetent, and immaterial. In this court the appellant sought to point out specific reasons why that objection was good, but it is said: "We think there was no error in overruling the general objection thus made. If the defendants desired to object to the offered evidence upon the ground that the proper foundation for its admission had not been laid, because it had not been shown that the facts stated in such answers were inserted with the knowledge of defendants, the objection should have been specifically pointed out and called to the attention of the court and the opposing counsel. If this specific objection had been made, it is possible that it could have been removed by further evidence upon the part of plaintiffs showing such knowledge; but the general objection that the offered evidence was incompetent was not sufficient. When such a general objection is overruled by a trial court, the party against whom the ruling is made cannot be permitted for the first time to urge in the appellate court the particular objection which, if it had been openly urged in the trial court at the time of the ruling complained of, might have been easily cured. This is

not laying down a merely technical rule. It is one which has its foundation in the proper consideration of what is due to the court and adverse counsel in the trial of a case." And the court refer to *Rush v. French*, 1 Ariz. 124, where it is said: "The object of requiring the grounds of objection to be stated, which may seem to be a technical rule, is really to avoid technicalities and prevent delay in the administration of justice. When evidence is offered to which there is some objection substantial justice requires that the objection be specified, so that the party offering the evidence can remove it if possible, and let the case be tried on its merits."

For like reasons the general objection made did not sufficiently point the further specific objection now urged that it was improper in framing the hypothetical question to refer the witness generally to the facts testified to by Dr. Huntington, as a basis for his opinion, but that the question itself should have contained a statement of such facts. Obviously, the general and sweeping suggestion "not a proper hypothetical question" would not be calculated to direct the court's or opposite counsel's attention to what objection was aimed at. It might refer to one of a dozen supposed reasons why the question was deemed improper. If, however, the objection were sufficient to raise the point, we are not prepared to hold that in an instance such as this, where the witness has heard a statement of facts by another, it is not sufficient, in putting the question, to direct his attention to such statement as the basis upon which his opinion is desired.

3. We cannot say the court abused its discretion in holding that the witness McCarthy had shown himself sufficiently qualified to answer the hypothetical question, tending to elicit his opinion as to whether the car of appellant could, with proper care and attention, have been stopped in time to avoid the collision. This is a question largely for the determination of the trial judge, and his ruling will not be disturbed except error clearly appears. In this case it does not so appear. We think

the witness disclosed sufficient knowledge of the subject to entitle his opinion to go to the jury. It is true he was not as familiar with the condition of the car as might have been desired, but this objection goes more to the weight of the evidence than its admissibility.

Nor is there any question but that the subject was one upon which the opinion of the witness was admissible. The manner of running electric cars, their rate of speed, and the facility with which they can be stopped or handled, is not a matter of such common knowledge that the jury could judge as intelligently as one skilled in their use. It was, therefore, proper to resort to expert evidence.

4. There was no error in admitting evidence on behalf of appellant's codefendant as to the custom between street railroad companies of giving the older company the right of way at crossings. The codefendant had been jointly sued with appellant for the alleged injury, and it had a right, if such custom existed, to establish the fact, as tending to show to the jury which defendant was guilty of the more culpable negligence, and thus save itself, if possible, from being mulct in damages.

5. The jury gave a verdict for ten thousand dollars, and it is claimed that this amount is excessive. While we might not, had the question rested with us, have awarded damages in so large an amount, yet we are unable, under all the circumstances, to say that the amount is so far excessive as to imply that it was awarded under the influence of passion or prejudice. The evidence as to the extent of plaintiff's injuries, and suffering therefrom, and the resulting condition of her physical system, as exhibited at the time of the trial, was not controverted by appellant, and, consequently, stands without conflict for whatever it tends to establish. While that evidence does not show that the immediate result of the accident was the infliction of any very great external injury, it does show resulting injury, flowing proximately therefrom, of a very serious character. According to the testimony of the medical witnesses,

owing to plaintiff's condition of pregnancy at the time, the result of the shock was such as to cause the death of the foetus and induce a miscarriage, and cause plaintiff a long and painful period of suffering through a number of months, which has left her constitution and nervous system much shattered and broken, greatly impaired the action of her heart, and weakened her eyesight—a condition regarded by her physicians as permanent. "In actions for negligence the law does not attempt to fix any precise rules for ascertaining what is a just compensation, but, from the necessity of the case, leaves the assessment of the damages to the good sense and judgment of the jury, whose province it is to make the assessment; and their verdict, though subject to review, will not be disturbed merely upon the ground that the damages are excessive, nor because the opinion of the court differs from that of the jury, unless it appears that the excess was given under the influence of passion or prejudice." (*Lee v. Southern Pac. R. R. Co.*, 101 Cal. 118.) Before the appellate court can interfere on the ground of excessive damages, the verdict must be so plainly and outrageously excessive as to suggest, at the first blush, passion or prejudice or corruption on the part of the jury. (*Aldrich v. Palmer*, 24 Cal. 513; *Wheaton v. North Beach etc. R. R. Co.*, 36 Cal. 590.) Applying these principles, we do not feel that we should be justified in disturbing the verdict upon the ground that it is excessive.

6. The other questions discussed do not require special notice. The objection that the evidence does not sustain the verdict is clearly untenable, and, in our judgment, the verdict sufficiently finds upon the issues submitted.

The judgment and order denying a new trial are affirmed.

GAROUTTE, J., and HARRISON, J., concurred.

Hearing in Bank denied.

[S. F. No. 168. Department Two.—December 19, 1895.]

IN THE MATTER OF THE ESTATE OF HIRAM ARTHUR  
PEARSONS, DECEASED.

**ESTATES OF DECEASED PERSONS—SUCCESSION—NEXT OF KIN OF DECEDENT**

**—AUNTS AND UNCLES OF WHOLE BLOOD—CONSTRUCTION OF CODE—**

Under subdivision 6 of section 1386 of the Civil Code, which provides that "if the decedent leave neither issue, husband, wife, father, mother, brother, nor sister, the estate must go to the next of kin in equal degree;" the next of kin in equal degree, in such case, are the aunts and uncles of the decedent, and, if they are of the whole blood, the estate must go to them in equal shares, regardless of the source from which the estate was derived.

**ID.—BLOOD OF FIRST PURCHASER APPLICABLE ONLY TO KINDRED OF HALF**

**BLOOD.**—Section 1386 of the Civil Code has no allusion to the blood of the first purchaser, and makes no attempt at any distinction founded upon the sources from which the estate of the decedent may have been derived; and section 1394, which deals entirely with cases of kindred of the half blood, does not qualify or change the rule of section 1386, respecting kindred of the whole blood, who, if next of kin, share in all the estate of the decedent, no matter from what source it comes.

**APPEAL** from an order of the Superior Court of the City and County of San Francisco making partial distribution of the estate of a deceased person. **J. V. COFFEY**, Judge.

The facts are stated in the opinion of the court.

*Isaac N. Thorne, and Oliver P. Evans, for Appellants.*

The heirs at law and next of kin being three brothers and two sisters of the intestate's mother, and two sisters of the intestate's father, the whole estate, without reference to the source from which it was derived, should be divided into seven equal parts, and each uncle and aunt take one-seventh. (Civ. Code, sec. 1386.) The heirs are all in the same degree of kindred, viz., the third degree. (Civ. Code, sec. 1393.) The rule of descents is regulated by statute. Section 1386 of the Civil Code is our modified and statutory substitute for the sixth common-law rule of descents as given by Blackstone. (2 Blackstone's Commentaries, 224.) Section 1394 of the Civil Code relates solely to kindred of the

half blood, and restricts their rights in particular cases; but does not enlarge them in any case, and is entirely silent and inoperative as to kindred of the whole blood, leaving them to be governed by section 1386, subdivision 6. (*Estate of Kirkendall*, 43 Wis. 167; *Robertson v. Burrell*, 40 Ind. 328; *Pond v. Irwin*, 113 Ind. 243; *Ryan v. Andrews*, 21 Mich. 229.) The word "unless" as used in section 1394 of the Civil Code is equivalent to "except." (*Wilson v. Smith*, 3 Burr. 1550; *Estate of Kirkendall*, *supra*.)

*John B. Mhoon*, for Respondent.

"Half blood" is a relationship (kindred) through only one parent, the father or mother. (Bouvier's Law Dictionary, Titles; *Baker v. Chalfant*, 5 Whart. 477.) The civil law supplies the rule under which descents are computed in California. (*People v. De la Guerra*, 24 Cal. 73.) Section 1386, subdivision 6, of the Civil Code, does not alone constitute the rule of distribution for these heirs, but must be construed together with section 1394 of the Civil Code, which modifies section 1386 with reference to the origin of the estate, when it has been acquired in a specified manner. (*Estate of Kirkendall*, 43 Wis. 167; *Ryan v. Andrews*, 21 Mich. 229; *Rowley v. Stray*, 32 Mich. 70; *Robertson v. Burrell*, 40 Ind. 328; *Speer v. Miller*, 37 N. J. Eq. 492.) The rule prescribed by the statutes for regulating the succession to an ancestral estate may be said, speaking generally, to be, that it shall descend only to those collaterals or ascendants who are of the blood of the person from whom the estate came. (24 Am. & Eng. Ency. of Law, 399; *Vaughan v. Jones*, 23 Gratt. 444; *Crowell v. Clough*, 23 N. H. 207; *Renfroe v. Taylor*, 12 B. Mon. 402; *De Castro v. Barry*, 18 Cal. 97; *Estate of Donahue*, 36 Cal. 329.)

MCFARLAND, J.—This is an appeal by Ira Mathewson, Daniel Mathewson, Henry Mathewson, Rhoda Smith, and Lucy A. Angell from parts of an order of

partial distribution of the estate of Hiram Arthur Pearsons, deceased.

Although said deceased left a will, the part of his estate here in question is, for reasons not necessary to be stated, to be distributed as though he had died intestate. His next of kin of equal degree are aunts and uncles, and are the appellants, who are sisters and brothers of the decedent's mother, Ann Charity Pearsons, and Clarissa P. Wheeler and Lucy A. Valentine, who are sisters of the decedent's father, Hiram Pearsons. (Lucy A. Valentine being now dead, her estate and interests are represented by her administrator, Joseph W. Reay.) The greater part of the estate to be distributed came to the deceased, Hiram Arthur Pearsons, by gift and devise of his father, Hiram Pearsons, deceased; while a lesser part came to him from his mother, Ann Charity Pearsons. The probate court held that all of said estate which came from the father should be distributed to said Clarissa P. Wheeler and the administrator of said Lucy A. Valentine; and that the appellants should share only in that part of the estate which came to the deceased from his mother. Appellants contend that the whole of the estate of the deceased should be distributed equally to all the aunts and uncles. This contention presents the only question to be determined on this appeal, and it appears to us quite clear that it must be sustained.

The rule which governs here is the one declared in subdivision 6 of section 1386 of the Civil Code, and is as follows: "If the decedent leave neither issue, husband, wife, father, mother, brother, nor sister, the estate must go to the next of kin in equal degree." In the case at bar "the next of kin" were the seven aunts and uncles of the decedent and they were "in equal degree"; therefore the estate goes to them in seven equal parts. Next of kin means, of course, next of kin *of the decedent*. Our code has no allusion to "the blood of the first purchaser," and makes no attempt at any distinction founded upon the sources from which the estate of



a decedent may have been derived—except in the single instance of kindred of the “half blood.” But no question of the rights of kindred of the half blood arises in this case; for all the aunts and uncles were *the decedent’s* kindred of the whole blood, of equal degree.

Respondents’ whole contention rests upon the theory that section 1394 of the Civil Code changes the rule of section 1386 above quoted. But, to see the mistake of that theory, it is only necessary to observe that section 1394 deals entirely with the case of kindred of “the half blood”—not with kindred of the whole blood, whose rights had already been fixed by section 1386. Section 1394 is as follows: “Kindred of the half blood inherit equally with those of the whole blood in the same degree, unless the inheritance came to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestor must be excluded from such inheritance.” Here the words “all those” clearly refer to their antecedents in the sentence “kindred of the half blood.” Kindred of the half blood being the subject of the main proposition of the section is necessarily the subject of the exception which follows the word “unless.” The section simply means that kindred of the half blood shall inherit equally with those of the whole blood, except in a certain case, and, in that case, *kindred of the half blood* shall not inherit. And who are kindred of the half blood?—why, of course kindred of the half blood of *the decedent*. There were none such in the case at bar. If the next of kin of equal degree of the intestate be some of the whole blood and some of the half blood of *the intestate*, the half blood, shall not inherit if they are not of the blood of the person from whom the intestate inherited the property to be distributed; but, if all be kin of the whole blood of the intestate, or if the half bloods be of the blood of the ancestor, then all share alike. Kindred of the whole blood, if next of kin, share in all of the estate of the decedent, no matter from what source it came.

Respondents present no case, arising under a statute like ours, which at all conflicts with the foregoing views; on the other hand they are clearly stated in the *Estate of Kirkendall*, 43 Wis. 167, which respondents cite. In that case, the intestate, Mary Jane Kirkendall, had inherited her estate from her mother. She left no kin except uncles, who were brothers of her mother, and a *paternal grandmother*. The grandmother was the next of kin, but it was contended that she did not inherit because she was not of the blood of the intestate's mother, and that the estate should go to the uncles who *were* of that blood. But it was held otherwise in the lower court, and the decree was affirmed in the appellate court. The clause of the statute there invoked was exactly like ours. The whole section (section 4) was as follows: "The degrees of kindred shall be computed according to the rules of the civil law; and kindred of the half blood shall inherit equally with those of the whole blood in the same degree, unless the inheritance came to the intestate by descent, devise, or gift of some one of his ancestors, in which case *all those* who are not of the blood of such ancestor shall be excluded from such inheritance." The discussion of the subject by Lyon, J., who delivered the main opinion, and by Ryan, C. J., who delivered a concurring opinion, is very full and interesting; but we have space to give only a few sentences of their opinions. Lyon, J., said: "Mary Jane Kirkendall, and not her mother, is the person from whom the succession to the estate in controversy is to be traced." Having stated that it was *not* the principle of the statute "to confine the descent of an ancestral estate to those who are of the blood of the ancestor from whom the estate descended," he proceeds to discuss the clause in question as follows: "The first clause of the section, which contains the rule for computing the degrees of kindred, does not aid the construction of the balance of the section. For that purpose it might as well have constituted a section by itself. The remainder of the section treats only of kindred of the half blood.

Their rights, and *theirs alone*, are therein defined and limited, and we find nothing in the language of the section which authorizes us to say that any other class of kindred is within its purview. We think the plain grammatical construction of the clauses under consideration is that the kindred of the intestate of the half blood shall inherit equally with those of the whole blood, *except* that if the estate is ancestral only such *kindred of the half blood* as are of the blood of the ancestor from whom the estate came shall inherit." We find here no limitation of the rule of subdivision 6, section 1, that "if the intestate shall leave no issue, nor widow, and no father, mother, brother, or sister, his estate shall descend to his next of kin in equal degree." From the able opinion of Ryan, C. J., we will quote only the following: "I think that, by all rules of construction, this clause is confined to the provision which it limits, and cannot otherwise affect the general rule of inheritance. It can have no application except in cases of next of kin of the half blood and the whole blood in equal degree, when it operates to exclude, in the particular case, the general right extended to the half blood. *Unless* is equivalent to *except*, and is here used to introduce an exception to the right of the half blood. All that follows it in the section is dependent on it, and qualified by it, and goes to define the exception which it declares. In the particular case 'all persons' are not excluded—but 'all those'; the relative pronoun relating back and clearly signifying all those of the half blood." (See, also, *Rowley v. Stray*, 32 Mich. 70; *Ryan v. Andrews*, 21 Mich. 229; *Robertson v. Burrell*, 40 Ind. 328.) *Speer v. Miller*, 37 N. J. Eq. 492, cited by respondents, was under a statute which expressly provides that ancestral estates shall go only to those who are of the blood of the ancestor from whom the estate came.

(It is said incidentally in the brief of appellants, that perhaps the administrator of Mrs. Valentine should not share in that part of the estate which came from

the decedent's mother; but we do not understand that the record presents that point.)

The parts of the order of distribution appealed from are reversed, and the cause is remanded with directions to the probate court to make distribution of all the estate of said Hiram Pearsons, deceased, now ready for distribution, in equal shares to the said seven aunts and uncles of said deceased.

HENSHAW, J., and TEMPLE, J., concurred.

Hearing in Bank denied.

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[No. 18419. Department One.—December 20, 1895.]

**CHARLES RICHTER, RESPONDENT, v. A. HENNING-  
SAN, APPELLANT.**

**CORPORATIONS—INTEREST OF STOCKHOLDERS.**—A stockholder in a private corporation for profit is not in any proper sense the owner of the property of the corporation; but he has a direct interest in the corporation, and a right to participate according to the amount of his stock in the surplus profits on a division, and ultimately, on its dissolution, in the assets remaining after payment of its debts.

**ID.—TAX UPON DISTILLERY BUSINESS—LIABILITY OF STOCKHOLDERS—CONTRIBUTION.**—Under the law of Congress, the stockholders of a corporation engaged in the use of a distillery are all jointly and severally liable for the tax imposed upon the corporation under section 3241 of the Revised Statutes, and, being jointly and severally liable for such tax, are liable to contribute their proportion to other stockholders, who have paid the tax in full for which all are liable.

**ID.—RIGHT TO CONTRIBUTION—STATUTE OF LIMITATIONS.**—A co-obligor acquires a right to contribution as soon as he pays more than his share of obligation, but not until then; and, consequently, the statute of limitations does not begin to run until such payment is made; and the liability of a co-obligor to contribution, where not founded upon an instrument in writing, is governed by the first subdivision of section 339 of the Code of Civil Procedure, and is barred in two years.

**ID.—FINDINGS—IMMATERIAL OMISSION.**—A failure to find upon a plea of the statute of limitations is not material where the other facts found are sufficient to support the judgment, and are not assailed for insufficiency of evidence.

**ID.—PRACTICE—ADDITION TO FINDINGS—CONCLUSION OF LAW.—IMMATERIAL ERROR.**—After the findings have been filed, and a judgment entered thereupon, the court cannot properly cause to be

filed an omitted finding upon the statute of limitations; and the judgment should not be reversed upon that ground where a finding upon that issue is but a conclusion of law from the other facts found.

**APPEAL** from a judgment of the Superior Court of Fresno County. J. R. WEBB, Judge.

The facts are stated in the opinion of the court.

*Sayle & Coldwell*, and *W. P. Thompson*, for Appellant.

The obligation of the stockholders of the Fruitvale Wine and Fruit Company to pay the tax upon the spirits distilled by that company is imposed by section 3251 of the Revised Statutes of the United States, if it exists at all, and it is a primary liability for which the company and all of its stockholders are jointly and severally bound. It is an obligation that arises by operation of law. (Civ. Code, sec. 1428.) The right of one stockholder to require contribution from another, if it exist at all, is fixed by the Civil Code, section 1432. A joint obligor not a party to the judgment is not bound by a judgment against his co-obligor. (Code Civ. Proc., sec. 1912; 2 Black on Judgments, secs. 573, 574, 591; Brandt on Suretyship and Guaranty, secs. 524, 525, 529; *Irwin v. Backus*, 25 Cal. 214; 85 Am. Dec. 125; *Commercial etc. Assur. Co. v. American Ins. Co.*, 68 Cal. 432; *Tay v. Hawley*, 39 Cal. 93.) The findings do not support the judgment, for the reason that there are no findings upon defendant's pleas of the statute of limitations. The finding on this issue, filed on the 28th of August, 1894, after judgment had been entered on the other findings, and without notice to, or an appearance by, the appellant, was without authority of law. (Code Civ. Proc., secs. 632, 633; *Van Court v. Winterson*, 61 Cal. 615; *Connolly v. Ashworth*, 98 Cal. 206.) Appellant's liability was barred at the time plaintiff's assignor paid the amount for which he asks contribution; therefore, it was not appellant's obligation, and it follows that plaintiff cannot acquire contribution of him. (*Stone v. Hammell*, 83 Cal. 551; 17 Am. St. Rep. 272; Code Civ. Proc., sec. 338.)

*George B. Graham, for Respondent.*

Where several persons are jointly and severally bound for the payment of a sum of money, and suit is brought before the statute has fully run, and one of the parties is compelled to pay the debt by virtue of a judgment and execution in such action, the person so paying is entitled to his action against the others for contribution, and such suit may be brought at any time within two years from the date when such person paid the judgment. (*Sherwood v. Dunbar*, 6 Cal. 53; 4 Am. & Eng. Ency. of Law, 3, note when statute of limitations begins to run, and cases cited.) The lower court was justified in filing the findings after entry of judgment, which were included in the oral announcement of the decision and entered in the minutes of the court, but inadvertently omitted from the findings first filed. (*Hayes v. Wetherbee*, 60 Cal. 396.)

THE COURT.—This is an action to enforce contribution by defendants as stockholders in the Fruitvale Wine and Fruit Company, a corporation organized and existing under and by virtue of the laws of the state of California, on account of money paid by the assignor of plaintiff upon a judgment against the stockholders in said corporation, and in favor of the United States, for eighteen hundred and twenty-seven dollars and forty cents, due to the United States as a balance on a tax of ninety cents per gallon upon the distillation of five thousand five hundred and eighty-six gallons of brandy and spirits by said corporation, between August 1, 1887, and September 22, 1887, which judgment is averred to have been paid February 2, 1892, by the First National Bank of Fresno, a corporation organized and existing under the laws of the state of California, a stockholder in the corporation first named, and one of the defendants and judgment debtors in said judgment in favor of the United States. Plaintiff, as the assignee of said First National Bank of Fresno, had judgment in the court below against sundry of the defendants herein,

and against the defendant L. A. Blasingame, for two hundred and thirteen dollars, from which judgment said Blasingame alone appeals.

The cause comes up on the judgment-roll, without a statement or bill of exceptions. Appellant contends that the complaint does not state facts sufficient to constitute a cause of action against him, and that the findings of the court are not sufficient to support the judgment.

So much of the complaint as is necessary to illustrate the point made by appellant may be epitomized as follows: 1. The "Fruitvale Wine and Fruit Company" was a California corporation; 2. Defendant (appellant here) was a stockholder in said corporation, and the owner of ten shares of its corporate stock out of one hundred and forty-one shares issued; 3. The corporation distilled five thousand five hundred and eighty-six gallons of brandy and spirits, upon which it was liable to pay to the government of the United States a tax of ninety cents per gallon, and which amounted in the aggregate to five thousand and twenty-seven dollars and forty cents; 4. In 1890 the United States of America brought an action in the circuit court of the United States, ninth circuit, southern district of California, against the First National Bank of Fresno, and certain others, all stockholders in said corporation, to recover from them said tax; 5. The corporation was insolvent and had no property; 6. The United States recovered judgment for two thousand one hundred and sixty-three dollars and two cents; 7. On January 2, 1892, an execution issued on said judgment, and was about to be levied upon the property of said bank, defendant, when it paid the judgment, and assigned its claim, or right to contribution by the other stockholders, to the plaintiff and respondent herein; and 8. It does not affirmatively appear that appellant was a defendant in said action by the United States.

The question is, Does the foregoing statement show a liability for his proportion of the tax, upon the part of

the appellant, either under the laws of the United States or under the constitution and laws of the state of California?

So much of the act of Congress of 1872 as bears upon the subject is to be found in the latter part of section 3251 of the Revised Statutes of the United States, and is as follows: "Every proprietor or possessor of, and every person in any manner interested in the use of, any still, distillery, or distilling apparatus, shall be jointly and severally liable for the taxes imposed by law on the distilled spirits produced therefrom," etc.

A stockholder in a private corporation for profit is not in any proper sense the owner of the property of the corporation as such. He has, however, a direct interest in the corporation. In *Plimpton v. Bigelow*, 93 N. Y. 592, it was said: "The right which a shareholder in a corporation has, by reason of his ownership of shares, is a right to participate according to the amount of his stock in the surplus profits of the corporation on a division, and ultimately on its dissolution, in the assets remaining after payment of its debts." *Gibbons v. Mahon*, 136 U. S. 549, and *Kohl v. Lilienthal*, 81 Cal. 378, are to like effect.

A stockholder has an insurable interest in the property of the corporation. (*Riggs v. Commercial Mut. Ins. Co.*, 125 N. Y. 7; 21 Am. St. Rep. 716; *Warren v. Davenport etc. Ins. Co.*, 31 Iowa, 464; 7 Am. Rep. 160.)

At common law a stockholder in a corporation, on account of his interest, was not a competent witness for the corporation in an action against it, or to serve as a judge or juror where the corporation was a party.

We must not confound the liability of a stockholder in a corporation, under the law of its creation, with that imposed upon him by the act of Congress. His liability under the latter is quite independent of the former, and is just what the act of Congress has imposed upon him.

That liability under the law applies not only to every proprietor and possessor of a still, but also to "every per-



*son in any manner interested in the use of any still, distillery, etc.,"* and makes them all jointly and severally liable for the tax. So far as we know this particular provision of the act has not received an interpretation by the supreme court of the United States.

In 1876 the acting secretary of the treasury addressed to the attorney general of the United States this precise question in the following language: "Is a stockholder in a distilling corporation, not otherwise liable for the debts of the corporation beyond the amount of his stock therein, made individually liable therefor by the provisions of section 3251 of the Revised Statutes, and can his individual property, in no way connected with the business of such corporation, be seized and distrained for taxes due on spirits produced by it?"

The answer was: "I am of the opinion that the section cited does include stockholders of private corporations engaged in distilling for gain," etc. The opinion proceeds to argue that stockholders are included in the expression "every person in any manner interested," and are therefore jointly and severally liable for the tax. (Opinions of Attorneys General, vol. 15, p. 559.)

A similar opinion may be found in volume 16 at page 10, where it was held that being jointly and severally liable under the provisions of section 3251 of the Revised Statutes for the taxes imposed upon the spirits manufactured by the corporation, stockholders therein could not be accepted as sureties upon a bond required of the corporation by another section.

These opinions, while not conclusive, are valuable as serving to show the interpretation given to the section of the Revised Statutes under consideration by the department of justice of the federal government. Like considerations apply to the ruling of the circuit court, in holding the stockholders liable for the tax due from the corporation in the case which serves as a predicate for this action.

We are of opinion the stockholders in the corporation had such an interest in the use of the distillery as ren-

dered them jointly and severally liable for the tax upon the spirits distilled therein, within the purview of section 3251 of the Revised Statutes, and hence that the allegations of the complaint stated facts sufficient in that respect to constitute a cause of action against them, and that the facts as found by the court which affirm these allegations were sufficient in that respect to support the judgment.

In the absence of any statement or bill of exceptions we must infer in favor of the judgment that there was evidence in support of every material fact found by the trial court, and hence we cannot assume that the judgment in the circuit court against the bank and others was accepted by such trial court as conclusive evidence that defendants in this action, who were not parties to the original suit in the circuit court, were bound by the judgment therein, but, on the contrary, we must presume that the evidence established their liability precisely as charged in the complaint and found by the court, which, as we have before observed, was sufficient to establish the liability of the defendant here.

The cause of action against these defendants is not based upon the judgment against the bank and others, but upon the fact that the Fruitvale Wine and Fruit Company, a corporation, owned, possessed, and operated a distillery, manufactured distilled spirits, upon which there was a tax due to the government of the United States, and that these defendants, as stockholders in said corporation, were *interested therein*, and hence liable under the statute. These facts, being charged and found, establish their liability. Being jointly and severally liable, defendants are liable to contribute their proportion to their co-obligors who have paid the demand for which all were liable.

The appellant, in his answer, pleaded the statute of limitations, and in his brief urges that "the findings do not support the judgment, for the reason that there are no findings upon defendant's plea of the statute of limitations." In the findings as originally prepared, and

upon which the judgment was entered, there was no finding upon the statute of limitations, but several weeks after the entry of the judgment, the court, by an *ex parte* order, and upon the ground that it had inadvertently omitted them, made, and caused to be filed, findings upon this plea. This practice was unauthorized, and, it may be conceded, was erroneous, but it does not follow that the judgment should be reversed on that ground. The judgment does not depend upon these findings, but finds its support in the findings which were originally filed. The appeal is brought here upon the judgment-roll alone, without any bill of exceptions, and the facts found by the court show of themselves that the action is not barred by limitation, and any finding that the court would have upon this plea must have been adverse to the defendant. A formal finding to that effect, in the absence of all the evidence upon which the facts found are based, would be but a conclusion of law, and, whether given or omitted, would not constitute reversible error.

The findings show that the demand of the United States was paid by the First National Bank of Fresno, the assignor of plaintiff, on the third day of February, 1892. The present action was brought August 18, 1892, less than two years thereafter.

"A party acquires a right to contribution as soon as he pays more than his share, but not until then, and, consequently, the statute of limitations does not begin to run until then." (2 Parsons on Contracts, 8th ed., 37, and cases there cited; *Sherwood v. Dunbar*, 6 Cal. 53.) The liability of a co-obligor to contribution, where not founded upon an instrument in writing, is governed by the first subdivision of section 339 of the Code of Civil Procedure, and is barred in two years.

The judgment appealed from is affirmed.

[No. 15912. Department Two.—December 20, 1895.]

**CALIFORNIA STATE BANK, RESPONDENT, v.  
CHARLES F. WEBBER, APPELLANT.**

**FORECLOSURE OF MORTGAGE—OPTION TO RENEW NOTE—PRESUMPTION—**

**BURDEN OF PROOF.**—In an action to foreclose a mortgage given to secure the payment of a note, where it appears that the original period for the maturity of the note was past at the time of the commencement of the action, the fact that the note provides that, if it is not paid at maturity, it is renewed from year to year, at the option of the holder, until paid, and that, during such year, the maker shall not have the right to pay the same, does not create a presumption that the note was renewed, in the exercise of the option, in the absence of evidence tending to prove it; and the burden is upon the maker to show affirmatively that the holder, in the exercise of the option given him, renewed the note, and thereby extended the time of payment to a day later than that on which the action was commenced.

**ID.—RENEWAL OF NOTE—EXTENSION OF TIME—PLEADING—AFFIRMATIVE**

**DEFENSE.**—If there had been a renewal of the note, in the exercise of the option, whereby the time of payment was extended to a later day than that on which the action was commenced, such renewal would have been matter of affirmative defense, which must have been pleaded and proved by the defendant.

**ID.—CONSTITUTIONAL LAW—AGREEMENT AS TO PAYMENT OF TAXES—**

**OPTION OF MORTGAGEE—CREDIT UPON INTEREST.**—Where a conventional rate of interest is agreed upon, a verbal agreement that if the mortgagor should pay the taxes and assessments on the mortgage a reduction should be allowed upon the agreed interest, is not in violation of the constitution of the state, and does not release defendant from his contract to pay the conventional interest specified in the note.

**ID.—VERBAL AGREEMENT AS TO TAXES—DEFENSE AS TO INTEREST.—A**

verbal agreement that the mortgagor shall pay the taxes upon the mortgage is no defense to the demand for interest.

**APPEAL** from a judgment of the Superior Court of Santa Clara County. JOHN REYNOLDS, Judge.

The facts are stated in the opinion.

*A. B. Hotchkiss*, for Appellant.

*Johnson & Johnson*, for Respondent.

The action was not prematurely brought, as the note was due, and the mortgage itself provided for foreclosure for nonpayment of principal or interest. (*Yokam v. White*, 97 Cal. 286; *Hewitt v. Dean*, 91 Cal. 5;

*Maddox v. Wyman*, 92 Cal. 674; *Sichler v. Look*, 93 Cal. 600.) The verbal agreement for the mortgagor to pay the taxes on the mortgage did not invalidate the note as to the interest. (*Hewitt v. Dean*, *supra*; *Harralson v. Barrett*, 99 Cal. 607.)

VANCLIEF, C.—Action to foreclose a mortgage to secure payment of a promissory note, of which the following is a copy:

“\$2,500.00. SACRAMENTO, CAL., May 27, 1889.

“Two years after date, for value received, I promise to pay to the California State Bank, a corporation, or order, the sum of twenty-five hundred dollars, in gold coin of the present standard of value, with interest thereon from date until paid, at the rate of eight and one-half per cent per annum, in like coin, payable annually, and, if not so paid, the interest may be added to the principal, and bear like interest, or the whole note may, at the option of the holder, without notice to the maker thereof, be treated as due and collectible. If this note is not paid at maturity, it is hereby renewed from year to year, at the option of the holder, until paid, and during such year the maker shall not have the right to pay the same. Both principal and interest to be paid at the California State Bank in Sacramento, California.

CHAS. F. WEBBER.”

The mortgage, bearing the same date as the note, contained the following provision: “And in case default be made in the payment of said note, or any installment thereof, or of any interest thereon, then the mortgagee may, at their option, and without notice to the mortgagor, at once proceed to foreclose this mortgage.”

This action was commenced August 26, 1893, without previous notice to defendant of any exercise of plaintiff's option mentioned in the note or in the mortgage.

It was alleged in the complaint, among other things, that no part of said note has been paid, either principal or interest, and the whole thereof, amounting to

three thousand five hundred and eighteen dollars and forty-four cents, is due, owing, and unpaid.

The defendant's demurrer to the complaint, on the ground that it does not state a cause of action, was overruled.

Thereupon, the defendant answered, denying that the debt evidenced by the note was due at the time of the commencement of the action, and denying that no part thereof had been paid, and alleging certain payments of interest and taxes on the mortgage; and, as a separate defense to the demand for any interest whatever, alleged as follows:

"That at the time and place the said note and mortgage were made, executed, and delivered, as alleged in the complaint, it was then and there agreed by and between plaintiff and defendant, C. F. Webber, and as a part of the same contract, and of the same transaction with the making of the said note and mortgage, that the said Webber, defendant herein, should and would pay and discharge all taxes and assessments which might be assessed or levied upon said money so loaned by plaintiff to said defendant, and on the said mortgage, or on either the said money or mortgage, anything in the said promissory note or mortgage, or either, to the contrary notwithstanding; it was also agreed that the real rate of interest to be paid by defendant for the use of said money was to be seven per cent per annum; but, for the purpose of covering said taxes and assessments on said money and mortgage, the rate of interest was inserted in said note as eight and one-half per cent, and it was agreed between the said parties that, if this defendant should pay said taxes and assessments on said money or mortgage and the interest on said note annually at seven per cent per year, together with the principal sum, the same should be in full payment of said note and interest, notwithstanding the rate in said note was nominally eight and one-half per cent.

"That said agreement and arrangement was knowingly made and omitted from the terms of said note and

mortgage, with the intent to evade the provisions of section 5 of article XIII of the constitution of this state; and, on that ground, defendant denies that any interest is due or owing or unpaid from defendant to plaintiff."

The court found that the defendant had paid the interest according to the terms of the note for the first three years, that is, until May 27, 1892, and had also paid the taxes on the mortgage for the same period amounting to thirty-nine dollars and eleven cents, but had failed to pay the interest for the fourth year ending May 27, 1893, or any part of the principal; and further found that the principal and interest, minus said payments, was overdue at the time the action was commenced. As to the alleged agreement, that the mortgagor should pay the taxes on the mortgage, the court found as follows:

"That prior to the execution of the said note and mortgage it was verbally agreed between the defendant Webber and A. Abbott, who then was the cashier of the plaintiff, that if the defendant Webber should pay the state and county taxes each year assessed against the mortgage of the plaintiff, then said defendant would be credited upon the interest due upon said promissory note with one and a half per cent thereof, and the amount of interest that said defendant should pay to plaintiff, in case he paid such taxes, should be seven per cent per annum; that said defendant did pay said taxes for the year 1890, 1891, and 1892, and paid interest on said note as aforesaid found at the rate of one hundred and seventy-five dollars per year, being seven per cent per annum, up to May 27, 1892, and such payments of interest were accepted by plaintiff in full payment of the interest due for said period; that since May 27, 1892, the defendant has paid no interest whatsoever and has paid no taxes assessed upon said mortgage for any other year than said 1890, 1891, and 1892."

As matter of law the court found that plaintiff was entitled to a decree of foreclosure for the full amount of principal and interest, according to the terms of the

note, less the amount of said payments of interest and taxes, and so decreed.

1. It is contended by appellant that, according to the terms of the note and mortgage, the defendant was not in default, nor the note due, at the time the action was commenced; but to maintain this point it devolved upon the defendant to show affirmatively that the plaintiff, in the exercise of the option given him, renewed the note and thereby extended the time of payment to a day later than that on which the action was commenced; yet he neither alleged nor attempted to prove such renewal of the note. In the absence of evidence tending to prove it, such renewal of the note cannot be presumed. If there was no renewal of the note, nor extension of the time of payment, both principal and interest became due on May 27, 1891. If there had been a renewal of the note, whereby the time of payment was extended to a later day than that on which the action was commenced, such renewal would have been relevant only as an affirmative defense, which must have been pleaded and proved by the defendant.

2. The alleged agreement that the mortgagor should pay the taxes on the mortgage, *as found by the court*, is not a violation of the constitution of the state, and does not release defendant from his contract to pay the conventional interest specified in the note, even though that agreement had been found to be in writing (*Hewitt v. Dean*, 91 Cal. 10); and the only exception to that finding is that the agreement was found to have been merely verbal, whereas the court should have found that it was in writing.

Neither is the agreement as pleaded by defendant any defense to the demand for interest, unless it was in writing. (*Daw v. Niles*, 104 Cal. 106; *Harrelson v. Tomich*, 107 Cal. 627.) The only evidence that the agreement was in writing was the testimony of defendant that plaintiff wrote with a lead pencil on the margin of the note "seven per cent," which, it is claimed, had been erased. But he further testified that the agreement that



he should pay the taxes on the mortgage was not written, for the reason that the officer of the bank with whom he made the agreement said such an agreement would not be lawful; and this corresponds with the averment in his answer, that the agreement "was omitted from the terms of said note and mortgage." It is, therefore, clearly apparent that the finding that the agreement was verbal was justified by the evidence.

I think the judgment and order should be affirmed.

SEARLS, C., and BELCHER, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

McFARLAND, J., TEMPLE, J., HENSHAW, J.

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[No. 16024. Department Two.—December 20, 1895.]

E. SCHWIESAU, APPELLANT, v. T. J. MAHON ET AL.,  
RESPONDENTS.

**STREET ASSESSMENT—LIEN IN INVITUM—STRICT COMPLIANCE WITH STATUTE—EQUITIES OF CLAIMANT.**—In order to fix upon property the lien of a street assessment, every requirement of the statute that could be of benefit to the person to be charged with the lien must be strictly complied with; nor can the equities of the claimant be regarded where there is no such compliance.

**ID.—NECESSITY OF WRITTEN CONTRACT—ABSENCE OF SPECIFICATIONS—VOID CONTRACT—NO LIEN FOR PROPER WORK.**—The statute requires the contract to be in writing, and signed by the contractor; and, where the contract signed does not define the work to be done, nor refer to any specifications in which it is described, there is no valid contract for the work, and therefore no valid lien of a street assessment, although the work may have been done strictly in accordance with the specifications referred to in the advertisement for bids.

**ID.—INSUFFICIENCY OF BOND—OBLIGATION OF SURETIES—CORRECTION OF CONTRACT UPON APPEAL.**—The bond required of the contractor, to be valid, must be conditioned that the contractor will perform the contract entered into by him, and a defect in the contract as to specifications for the work cannot be corrected by an appeal to the board, which cannot provide sureties for its performance, without which there can be no binding contract; and the original sureties are entitled to stand upon the letter of the original contract, and cannot be bound by any correction thereof upon appeal.

APPEAL from a judgment of the Superior Court of Marin County and from an order denying a new trial. J. M. SEAWELL, Acting Judge.

The facts are stated in the opinion of the court.

*D. H. Whittemore*, for Appellant.

The board, after having acquired jurisdiction so to do, ordered the work to be done in accordance with specifications "on file and filed July 7, 1890." The superintendent of streets advertised for proposals as directed to do the work according to the specifications so on file; the contractor bid to do the work in accordance with the specifications so on file, and the board awarded the contract in accordance therewith. Here was a complete contract. (*Chambers v. Satterlee*, 40 Cal. 497.) The contract to do the work in accordance with the specifications on file was complete when the bid was accepted. (*Chambers v. Satterlee*, *supra*.) As the exact contract awarded was entered into, the failure of the superintendent of streets to attach the specifications to the contract was a mere technical error which appeal cures. (*Dyer v. Parrott*, 60 Cal. 551.) It was only the contract made by the board that the superintendent of streets had the authority to reduce to writing. (*Chambers v. Satterlee*, *supra*; *Manning v. Den*, 90 Cal. 614; *McVerry v. Boyd*, 89 Cal. 304.) If different specifications were attached, the board could order the contract to be reformed and refuse to allow an assessment until the work was made to conform to it. (*Chambers v. Satterlee*, *supra*.) The defect is not jurisdictional. (*Miller v. Mayo*, 88 Cal. 568; *Dowling v. Altschul* (Cal., July 13, 1893), 33 Pac. Rep. 495; *Jennings v. Le Breton*, 80 Cal. 8; *Himmelman v. Hoadley*, 44 Cal. 276; *Boyle v. Hitchcock*, 66 Cal. 129; *Frick v. Morford*, 87 Cal. 577; *McVerry v. Boyd*, *supra*; *Fanning v. Leviston*, 93 Cal. 188, citing *Chambers v. Satterlee*, *supra*; *Oakland Paving Co. v. Rier*, 52 Cal. 270; *Spaulding v. North San Francisco etc. Assn.*, 87 Cal. 41; *Shipman v. Forbes*, 97 Cal. 572.)

*E. B. Mahon*, for Respondents.

Without the specifications the contract is void. (*Holland v. Wilson*, 76 Cal. 434.) A valid contract between the superintendent of streets and the contractor is absolutely necessary, and, if there is no such contract, there can be no valid assessment. (*Dougherty v. Hitchcock*, 35 Cal. 512; *Raisch v. San Francisco*, 80 Cal. 1.) The contract which is the foundation of this suit, and upon which this street assessment is founded, being utterly void, there being in fact, as the court found, no valid contract for doing this work, the assessment, warrant, and all subsequent proceedings were void; and it becomes immaterial whether the trial court erred in other matters, as the same judgment would result, and plaintiff was not prejudiced. (Street Law, Stats. 1889, sec. 3, p. 158; *Dougherty v. Hitchcock*, *supra*; *Worden v. Hammond*, 37 Cal. 63; *Willamette etc. Co. v. College Co.*, 94 Cal. 233; *Boydell v. Drummond*, 11 East, 157; *Manning v. Den*, 90 Cal. 614, 615; *Fanning v. Schammel*, 68 Cal. 429.)

TEMPLE, J.—By this action it was sought to foreclose the lien of a street assessment. The court held that there was no valid contract for the work, and therefore no lien.

Defendant put in evidence, at the trial, the contract entered into by the plaintiff. By it plaintiff agreed to do all the work necessary to be done to grade Fifth street in the town of San Rafael, and to construct curbing and rock gutterways along both sides of said Fifth street, between certain points named, "All in strict accordance with the specifications hereto annexed and made a part of this contract, and also that he will furnish, at his own cost and expense, all necessary material required for the execution and completion of said work, and in full accordance with said specifications and to the satisfaction of the said superintendent of streets."

No specifications were attached to the contract, and it was shown by the evidence of the street superintendent that none had ever been attached thereto.

Plaintiff contends that, inasmuch as bids were received to do the work in accordance with the specifications, which, in the advertisement for bids, were specifically referred to, and as the superintendent of streets was not authorized to reduce to writing any other contract than that made by the board, there could be no mistake as to the specifications, and, as the work has been done strictly in accordance with them, the objection cannot now be made.

If the contract were one entered into by the taxpayer individually, there would be no answer to this position. But this is a proceeding to fix upon property a lien, *in invitum*, and it has been held that in such case every requirement that could be of benefit to the person to be charged must be complied with.

It cannot be said that there is no possible benefit to the owner in having a written contract signed by the contractor. In this case the contractor was required to give a bond with sureties for the faithful performance of the contract. This bond, to be valid, must be conditioned that the contractor will perform the contract entered into by him. Sureties are bound only and may insist upon the very letter of their contract. In this case would there be any contract by which they would be bound? The statute requires the contract to be in writing and signed by the contractor. The contract signed does not define the work to be done, nor does it refer to any specifications in which it is described. It not only does not refer to specifications filed, but negatives such reference by express reference to those attached.

It is said that the owner might have had this corrected by appeal to the board. But an appeal to the board could not have provided the security by a written contract, and sureties for its performance without which there was no binding contract. If the assessment had been vacated and the work rejected it would not then have been in the power of the board to supply this defect. (*Manning v. Den*, 90 Cal. 614.) In that case

*Dougherty v. Hitchcock*, 35 Cal. 524, was expressly affirmed, and if *Chambers v. Satterlee*, 40 Cal. 497, contains anything contrary to this doctrine, it was, so far, overruled in *Manning v. Den*, *supra*.

The case seems a hardship, but it must be remembered that it is a proceeding to charge one with the cost of improvements for which he has not contracted. The liability depends upon a strict compliance with the law, and not upon the equities of the claimant.

The judgment and order are affirmed.

**McFARLAND, J., and HENSHAW, J., concurred.**

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[No. 15983. Department One.—December 23, 1895.]

**CHARLOTTE NORTHEY, APPELLANT, v. BANKERS' LIFE ASSOCIATION, RESPONDENT.**

**LIFE INSURANCE—MATURITY OF ASSESSMENT—CONSTRUCTION OF POLICY.**

The language of a policy of life insurance is to be construed most strongly against the insurer; and a premium or assessment which is payable during a specified month is presumed to be payable upon the last day of the month, in the absence of anything more definite in the policy fixing the day or date of maturity of the obligation.

**ID.—NOTICE OF ASSESSMENT—TIME OF PAYMENT.**—A notice that an assessment must be paid during the month of April is, in effect, a notice that the insured would have to and including the last day of April in which to make the payment.

**ID.—EFFECT OF HOLIDAY—DEATH UPON FOLLOWING DAY—NONPAYMENT OF ASSESSMENT—FORFEITURE.**—Where the last day of the month upon which an assessment or premium is to fall due is a holiday, the assured has all of the first day of the following month in which to make the payment; and if the insured person dies on that day, the policy is not forfeited for nonpayment, under a provision that membership shall cease upon failure of the assured to make any payment due from him to the association at its maturity in specified months, and the amount of the policy may be recovered by the assured from the life association.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. **J. M. SEAWELL, Judge.**

The facts are stated in the opinion.

*Van Ness & Redman*, for Appellant.

Where a period of time is given for the performance of an act, and the last day of the period falls upon a holiday, the act may be performed upon the day following. (Code Civ. Proc., sec. 13; *Blackwood v. Cutting Packing Co.*, 71 Cal. 461; *Hibernia Sav. etc. Soc. v. O'Grady*, 47 Cal. 579; *Hammond v. American etc. Ins. Co.*, 10 Gray, 306; *Campbell v. International etc. Soc.*, 4 Bosw. 298; Bliss on Life Insurance, 2d ed., 317; Bacon on Benefit Societies, 550; *Sands v. Lyon*, 18 Conn. 18; *Mattison v. Marks*, 31 Mich. 421; 18 Am. Rep. 197; *Helmer v. Krolick*, 36 Mich. 371; 2 Am. & Eng. Ency. of Law, 396, notes.) Where the language of a policy may be understood in more senses than one, it is to be construed most strongly against the insurer, because he frames it, and is supposed to make it as potent as possible in his own favor. (Civ. Code, sec. 1654; *Rankin v. Amazon Ins. Co.*, 89 Cal. 209; 23 Am. St. Rep. 460; *Thompson v. Phenix Ins. Co.*, 136 U. S. 287; *Hoffman v. Aetna Ins. Co.*, 32 N. Y. 413; 88 Am. Dec. 337; *Livingston v. Stickles*, 7 Hill, 255; *Breadsted v. Farmers' etc. Co.*, 8 N. Y. 305; 59 Am. Dec. 482; *Catlin v. Springfield etc. Ins. Co.*, 1 Sumn. 440; *Weeks v. Hull*, 19 Conn. 381; 50 Am. Dec. 249.)

*Sheldon G. Kellogg*, for Respondent.

The time of payment in life insurance is material, and cannot be extended by the courts against the assent of the company. (*New York Life Ins. Co. v. Statham*, 93 U. S. 24; *Anderson v. St. Louis Life Ins. Co.*, 1 Fed. Cas. 846; 1 Flap. 559, and cases therein cited.) As the certificate requires the payment during the month of April, it could not be made on the first day of May. (*Brooklyn Oil Refinery v. Brown*, 38 How. Pr. 444.) The fact that the last day of April was Sunday makes no difference, as the number of secular days during April was the same as it would have been if the twenty-ninth day of April had been Sunday. (*Harrison v. Sager*, 27 Mich. 476.) This case is not one of a definite number of days, but of a period of time. The rule allowing the

act to be performed on Monday, when the last day falls on Sunday, does not apply in such cases. (*Johnson v. Meyers*, 54 Fed. Rep. 417; *Williams v. Lane*, 87 Wis. 152; *Haley v. Young*, 134 Mass. 364.)

BELCHER, C.—On July 29, 1892, a certificate of membership in the defendant corporation was issued to Frank T. Northey, providing that in the event of his death, during his membership, his wife, Charlotte Northey, who was named in the certificate as beneficiary, should receive the sum of two thousand dollars, and the return of a portion of the guarantee fund, amounting to thirty-one dollars.

The certificate also provided that “upon the failure of the above-named member to make any payment due from him to the association at its maturity, in January, April, July, or October, of each year, his guarantee deposit shall be forfeited, and his membership shall thereupon cease.”

Certain payments became due from Northey to the association in the months of July and October, 1892, and January, 1893, and were made at their respective dates of maturity in said months. Upon or about April 1, 1893, Northey received from the defendant a written notice that an assessment of three dollars and ten cents had been levied against him, and that the said sum must be paid during the month of April, 1893. Upon April 28th Northey was shot, and mortally wounded, and upon May 1st he died. The last day of April fell upon a holiday, Sunday, and this last assessment was never paid.

Subsequent to the death of Northey the plaintiff, who was the payee named in the certificate, furnished the defendant due notice and proof of his death, and otherwise performed all the conditions of the certificate required of her, but the defendant refused to pay to her the said sum of two thousand and thirty-one dollars, or any part thereof.

Thereafter the plaintiff commenced this action, and,

in an amended complaint, set forth the facts as above stated, and demanded judgment against the defendant for the sum of two thousand and thirty-one dollars, with interest and costs. The defendant demurred to the complaint upon the ground that it appeared therefrom that the assessment maturing and payable during the month of April, 1893, was not paid during said month, or at all, and that the nonpayment of the same at its maturity caused the membership of Northey in the association to cease before his death. The court sustained the demurrer and gave judgment for the defendant, from which the plaintiff appeals.

It will be observed that the only provision in the certificate as to the forfeiture of membership is that upon the failure of the assured "to make any payment due from him to the association *at its maturity* in January, April, July, or October, of each year," his membership shall cease. This in no way fixes the day or date of maturity. It might be the last or any other day of the month. And, as against the insurer, in the absence of anything more definite, it would be presumed to be the last day of the month, the general rule being that, "where the language of a policy may be understood in more senses than one, it is to be construed most strongly against the insurer, because he frames it, and is supposed to make it as potent as possible in his own favor." (*Rankin v. Amazon Ins. Co.*, 89 Cal. 209; 23 Am. St. Rep. 460; *Thompson v. Phenix Ins. Co.*, 136 U. S. 287; Civ. Code, sec. 1654.)

It will also be observed that the notice of the assessment of three dollars and ten cents, which was not paid, was only that the said sum must be paid *during* the month of April, 1893. This was in effect a notice that the insured would have to and including the last day of April to make the payment.

Our Codes provide: "Whenever any act of a secular nature, other than a work of necessity or mercy, is appointed by law or contract to be performed upon a particular day, which day falls upon a holiday, such act



may be performed upon the next business day with the same effect as if it had been performed upon the day appointed." (Code Civ. Proc., sec. 18; Civ. Code, sec. 11.)

In *Blackwood v. Cutting Packing Co.*, 71 Cal. 461, the time for the defendant to answer was extended by stipulation "to and to include February 17, 1884." On the 18th of February, no answer being filed, the default of the defendant was entered and judgment rendered in favor of the plaintiff. In due time the defendant moved to set aside the default and judgment upon the ground that the default was entered and the judgment rendered before the time to answer had expired. The seventeenth day of February fell upon Sunday, a holiday, and, on appeal from the order of the trial court denying the motion, it was held that under the stipulation and the provisions of the codes the defendant was entitled to answer at any time during the succeeding Monday.

In *Campbell v. International Life etc. Soc.*, 4 Bosw. 298, the assured held a policy which provided that it would not be in force "if the premiums remain unpaid beyond thirty days after becoming due." A premium became due on the 29th of May, and the policy holder was notified that unless the same should be paid "on or before thirty days from that date the policy will become void." The last day of the thirty days was Sunday, and the question was, Could the tender of the premium be made on the Monday following? It was held that it could, and that the policy was not forfeited because payment was not made within the thirty days.

In *Hammond v. American etc. Ins. Co.*, 10 Gray, 306, the assured held a policy which provided that the premiums should be paid quarterly in advance "on or before the day, at noon, on which the same shall become due and payable." A premium became due on October 1st, which was Sunday, and it was held that a tender on the day following was in time. The court said: "The day of payment was on this occasion the first day of October. That day, as it appears, fell on Sunday;

and, this being so, he was entitled to the ordinary privilege of discharging his obligation on the Monday following. The quarter yearly payment, it is true, in terms became payable on Sunday noon; but that day was not a day for secular business, and, therefore, legally speaking, Sunday was not the day 'at which the same became payable'; and so, by the very provision of the policy, properly construed, the quarterly premium was seasonably tendered on Monday."

In Bliss on Life Insurance, second edition, page 317, it is said: "If the last day for the payment of the premium, as fixed in the policy, occurs upon Sunday at noon, the premium is not payable till the following Monday, and the company is liable if the assured dies Sunday afternoon."

In *Sands v. Lyon*, 18 Conn. 18, the father of the defendant devised to him certain real property "on condition he do pay, in one year next after my decease, to each of my daughters . . . one hundred dollars." The last day of the year, next after the death of the testator, fell on Sunday, and the court held that payment might be made on the following Monday, saying: "We think that the defendant had, by the terms of the devise, a full year allowed him for paying the money; and, therefore, that he was not bound to pay it on the Saturday preceding the day on which the year expired."

And in *Weeks v. Hull*, 19 Conn. 376, 50 Am. Dec. 249, the court, referring to *Sands v. Lyon*, *supra*, said that the case recognized a conservative principle, which ought to govern all other cases to which it is applicable, namely, "that the computation of time should be so made as to protect a right and prevent a forfeiture, if this can be done without violating a clear intention or a positive provision."

Without following the adjudicated cases further, it is enough, in our opinion, to say that, as Northey had to and including the last day of April to pay the assessment against him, and, as that day was Sunday, he was, under the law, as declared by the codes and the cases

cited, entitled to make the payment at any time during the ensuing Monday. It follows, therefore, that his certificate of membership was still in force at the time of his death, and that the court erred in sustaining the demurrer to the complaint.

The judgment should be reversed and the cause remanded, with directions to the court below to overrule the demurrer.

**HAYNES, C., and BRITT, C., concurred.**

For the reasons given in the foregoing opinion the judgment is reversed and the cause remanded with directions to the court below to overrule the demurrer.

**GAROUTTE, J., VAN FLEET, J., HARRISON, J.**

Hearing in Bank denied.

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[L. A. No. 34. Department One.—December 23, 1895.]

**J. J. ARBIOS, APPELLANT, v. COUNTY OF SAN BERNARDINO, RESPONDENT.**

**CLAIM AGAINST COUNTY—PREMATURE SUIT—PARTIAL REJECTION OF CLAIM—FINAL ACTION OF SUPERVISORS—CONSTRUCTION OF COUNTY GOVERNMENT ACT.**—Under sections 43 and 44 of the County Government Act, where the supervisors have allowed a portion of a claim presented, and rejected the remainder, the claimant, if dissatisfied with the rejection of the claim in part, is required to indicate to the supervisors his unwillingness to accept the amount allowed, and to give them an opportunity to again consider his claim for final action at the next regular succeeding session of the board, and a suit brought by the claimant before such final action is had by the supervisors upon the claim, is premature, and cannot be sustained.

**APPEAL** from a judgment of the Superior Court of San Bernardino County. **GEORGE E. OTIS, Judge.**

The facts are stated in the opinion of the court.

*Henry W. Nisbet, for Appellant.*

*F. B. Daley, District Attorney, and L. M. Spracher, Assistant District Attorney, for Respondent.*

Appellant should have presented his claim to the board a second time if he was not satisfied with the amount allowed by the board the first time, in order that an opportunity of amicable adjustment should be first afforded to the county, before she could be charged with the costs of suit. (County Government Act, secs. 43, 44; Stats. 1891, p. 311; *McCann v. Sierra County*, 7 Cal. 121; *Alden v. Alameda County*, 43 Cal. 270; *Estee's Pleadings*, sec. 399, and note, citing *Abbott's Forms*, No. 184, and authorities there cited; *Rhoda v. Alameda County*, 52 Cal. 350.)

HARRISON, J.—The plaintiff is constable of one of the townships in the county of San Bernardino, and on the fifth day of May, 1894, filed with the clerk of the board of supervisors of that county, and presented his claim for three hundred and eighty-three dollars and forty cents, properly itemized and verified, for services rendered by him as such constable. The board of supervisors at its meeting on the 7th of August allowed the claim for one hundred and ninety-eight dollars and ninety-nine cents. Thereupon the plaintiff commenced the present action to recover the full amount of his claim. A demurrer to the complaint was sustained by the court, and from the judgment entered thereon this appeal is taken.

The controverted question on this appeal is whether the plaintiff was authorized to bring an action upon the claim before the supervisors had acted thereon, after being informed of his unwillingness to accept the amount allowed. Section 43 of the County Government Act (Stats. 1893, p. 364), after providing that the board of supervisors may allow a portion of a claim presented, provides: "If the claimant is unwilling to receive such amount in full payment, the claim may again be considered at the next regular succeeding session of the board, but not afterward"; and section 44 provides: "A

claimant dissatisfied with the rejection of his claim or demand, or with the amount allowed him on his account, may sue the county therefor at any time within six months after the final action of the board, but not afterward."

This provision in section 44, limiting his right to sue the county to six months after its "final action" upon his claim, implies that the board is to act more than once thereon, and its "final action" is that which in the concluding portion of section 43 is directed to be taken when it has again considered the claim, after learning that the claimant is dissatisfied with its prior action. The supervisors would not know whether the claimant would be willing to accept the amount allowed, unless he should in some way indicate his disposition, and until they were informed of his unwillingness there would be no occasion for them to again consider the claim. Statutes requiring the presentation of claims against a county are framed with the purpose of avoiding useless expense in litigation, and to give to the county ample opportunity to avoid such expense; and we hold, therefore, that under a proper construction of the concluding portion of section 43 the plaintiff was required to indicate to the supervisors his unwillingness to accept the amount which they had allowed, and give them an opportunity to again consider his claim, in order that the county might have an opportunity to avoid incurring the costs of litigation which, by section 44, would be imposed upon it if he should recover a judgment for more than the amount for which the claim was allowed. He was not authorized to bring a suit upon his claim until after they had again taken action thereon.

The judgment is affirmed.

GAROUTTE, J., and VAN FLEET, J., concurred.

[S. F. No. 113. Department One.—December 23, 1895.]

**ESTATE OF W. M. RYER, DECEASED. CHRISTOPHER  
B. RYER, APPELLANT, v. ELISABETH INA RYER,  
EXECUTRIX, ETC., ET AL., RESPONDENTS.**

**APPEAL—DISMISSAL—FAILURE TO SERVE ADVERSE PARTIES ON MOTION FOR A NEW TRIAL.**—Matters occurring prior to the judgment or order appealed from cannot be considered on a motion to dismiss an appeal upon the ground that the appeal has not been perfected; and the failure to serve the adverse party with the notice of intention to move for a new trial, or with the draft of a statement of the case, though it may be a reason for denying the motion\* for a new trial, or for refusing to settle the statement, or be a ground for affirming or reversing the order appealed from, does not deprive the appellate court of jurisdiction to hear the appeal, or constitute a reason for its dismissal upon the ground that the court has not acquired jurisdiction to hear it.

**ID.—UNAUTHENTICATED TRANSCRIPT—AUTHENTICATION BEFORE HEARING OF MOTION.**—Where a motion is made to dismiss an appeal upon the ground that the transcript has not been properly authenticated, if the appellant, prior to the hearing of the motion, files with the clerk of the appellate court a transcript properly authenticated by the clerk of the superior court, the ground of the motion is removed.

**ID.—APPEAL FROM ORDER DENYING NEW TRIAL—SERVICE OF NOTICE—ADVERSE PARTY.**—Upon appeal from an order denying a new trial, the parties to the motion in the court below are the only proper parties to the appeal, and the appellant is not required to serve a notice of appeal upon others than those to whom the original notice was directed, and who appear by the record to be adverse parties; and only the record can be examined for the purpose of determining who are such adverse parties.

**ID.—USE OF ORDER IN COLLATERAL ACTION—REMOTE EFFECT UPON THIRD PARTIES.**—The fact that the judgment or order appealed from may be used as evidence in some collateral action or proceeding, or that its reversal may have a remote or consequential effect to the prejudice of one who is not a party thereto, does not entitle such person to be made a party to the appeal; and no evidence extrinsic to the record to show that the reversal would have such effect can be received or considered on motion to dismiss the appeal.

**ID.—APPEAL IN PROBATE PROCEEDINGS—JUDGMENT-ROLL.**—There is no judgment-roll, strictly speaking, in proceedings in probate, but whenever such proceedings are so akin to a civil action as to necessitate the "papers" which are declared by section 670 of the Code of Civil Procedure to constitute the judgment-roll in a civil action, they may be held to constitute the judgment-roll referred to in section 661 of the Code of Civil Procedure.

**ID.—PETITION OF HEIR FOR SHARE OF ESTATE—COLLATERAL INQUIRY—NOTICE—PARTIES.**—The petition of an heir for a share of the estate of a deceased person is in the nature of a collateral inquiry, or episode, interjected into the proceedings for the administration

of the estate, presenting all the elements of a civil action instituted for the purpose of determining the right of the applicant to a share of the estate, and, in matters of procedure upon an appeal, should receive the same consideration as upon an appeal in a civil action; and it is only parties to the record who have appeared and resisted the application, upon the service of notice of the application, as required by section 1659 of the Code of Civil Procedure, who will be affected by a reversal of the judgment or order denying a new trial, and persons or corporations who did not resist the application, or place themselves upon the record, or make themselves parties to the proceeding, though they may have a beneficial interest in the estate, are not required to be served with the notice of motion for a new trial, or with the notice of appeal in such proceeding.

**MOTION in the Supreme Court to dismiss an appeal from an order denying a new trial in the matter of the application of Christopher B. Ryer, for partial distribution of the estate of Washington M. Ryer, deceased. WALTER H. LEVY, Judge.**

**The facts are stated in the opinion of the court.**

***Reddy, Campbell & Metson, and R. Y. Hayne, for Appellant.***

The notice of intention is not a part of the record on appeal, and cannot be looked at. If the notice is immaterial on appeal, its service must be also. (*Pico v. Cohn*, 78 Cal. 386; *Richardson v. Eureka*, 92 Cal. 65.) This point does not arise upon a motion to dismiss the appeal. (*Gumpel v. Castagnetto*, 97 Cal. 16; *Barnhart v. Fulkerth*, 92 Cal. 155; *Watson v. Sutro*, 77 Cal. 609.) On an application for partial distribution under section 1660 of the Code of Civil Procedure, the executor or administrator may appear and can appeal, and service upon him is a sufficient bringing before the court of those whom he represents. (*Estate of Kelley*, 63 Cal. 106.) It is only necessary on an appeal from an order denying a new trial to serve the notice of appeal on the parties to the motion for new trial in the court below. (*Watson v. Sutro*, *supra*; *In re Mackay*, 107 Cal. 303.)

*Stanly, Hayes & Bradley, and F. E. Spencer, for Respondents Elizabeth Ina Ryer et al.*

*George W. Haight, for Respondent San Francisco Protestant Orphan Asylum.*

Any party to the cause, whether nominally plaintiff or defendant or intervenor, whose interests are adverse to, or will be affected by, a reversal or modification of the judgment or order appealed from, is an adverse party within the meaning of section 940 of the Code of Civil Procedure. (*Senter v. De Bernal*, 38 Cal. 637, 660, et seq; *Randall v. Hunter*, 69 Cal. 80; *Milliken v. Houghton*, 75 Cal. 540; *In re Castle Dome etc. Co.*, 79 Cal. 246; *Harper v. Hildreth*, 99 Cal. 265; *Lancaster v. Maxwell*, 103 Cal. 67, 68; *Williams v. Santa Clara Min. Assn.*, 66 Cal. 193.) It is not necessary to entitle a party to appeal from an adverse decision, in some classes of cases, that he should have been a party to the record below, much less that he should have actually appeared and taken a part in the proceedings there. (*Howard v. Galloway*, 60 Cal. 10; *Bayliss on New Trial and Appeal*, 34; *Barnes v. Stoughton*, 6 Hun, 254; *Hobart v. Hobart*, 86 N. Y. 636.) The failure to file a transcript duly certified by the clerk of the proper court, or authenticated by the certificate or stipulation of the attorneys for all the parties in the cause, is ground for a dismissal of the appeal. (*Estate of Medbury*, 48 Cal. 83; *In re Wierbitszky*, 88 Cal. 333.) The failure of appellant to serve his notice of intention to move for a new trial and statement on such motion upon the Boys' and Girls' Aid Society, the Protestant Orphan Asylum, and the Protestant Episcopal Old Ladies' Home, is ground for dismissal of the appeal. (Code Civ. Proc., secs. 940, 1011, 1015; *Senter v. De Bernal*, *supra*; *Perkins v. Wakeham*, 86 Cal. 580; 21 Am. St. Rep. 67; *Hayne on New Trial and Appeal*, 210.)

HARRISON, J.— Motion to dismiss the appeal. The last will and testament of Washington M. Ryer, deceased, was admitted to probate and letters testamentary



issued thereon July 13, 1892, and after the expiration of four months therefrom the appellant herein, claiming to be an heir of the deceased, presented his petition to the superior court for the share of the estate to which he claimed to be entitled. To this petition the executors and certain of the heirs and legatees of the deceased filed their answers, and the issues thus presented were tried by the court, and judgment rendered denying the petition. The petitioner then moved for a new trial, which was denied, and he has appealed from the order denying this motion. A motion is now made by the executors, and also by certain corporations claiming to be beneficiaries under the will of the deceased, to dismiss the appeal, upon the grounds that the notice of intention to move for a new trial, as well as the appellant's draft of his statement of the case, were not served upon these corporations; that the transcript on appeal, which was filed herein, was not properly authenticated by reason of not having been certified on behalf of these corporations; that the notice of appeal was not served upon either of these corporations, and that, as they are adverse parties to the appellant, this court has no jurisdiction of the appeal unless they have been properly brought before it.

1. A failure to serve the adverse party with notice of the intention to move for a new trial, or with the draft of a statement of the case, may be a reason for denying the motion for a new trial, or for refusing to settle the statement, and may, upon an appeal, if such service was necessary, be a ground for affirming or reversing the order appealed from; but it does not deprive this court of jurisdiction to hear the appeal, or constitute a reason for its dismissal upon the ground that the court has not acquired jurisdiction to hear it. (*Barnhart v. Fulkerth*, 92 Cal. 155.) Matters occurring prior to the judgment or order appealed from cannot be considered on a motion to dismiss an appeal upon the ground that the appeal has not been perfected. (*Centerville etc. Ditch Co. v. Bachtold*, 109 Cal. 111.)

2. Prior to the hearing of this motion the appellant had filed with the clerk of this court a transcript properly authenticated by the clerk of the superior court, and has thus removed this ground of the motion. (*Estate of Medbury*, 48 Cal. 83; *Woodside v. Hewel*, 107 Cal. 141; *Warren v. Hopkins*, ante, p. 506.)

3. Upon an appeal from an order denying a new trial, the parties to the motion in the court below are only proper parties to the appeal (*Watson v. Sutro*, 77 Cal. 609); and the appellant is not required to give notice of appeal to others than those to whom the original motion was directed. The "adverse party" upon whom a notice of appeal is to be served is the party who appears by the record to be adverse (*Harper v. Hildreth*, 99 Cal. 265); and the record which is to be considered for that purpose is the record of the proceedings in which the appeal is taken. The rule that the notice of appeal must be served upon all parties that would be affected by a reversal of the order and judgment appealed from, is to be construed with the other rule that only the record can be examined for the purpose of determining who are such adverse parties. The fact that the judgment or order may be used as evidence in some collateral action or proceeding, or that its reversal may have a remote or consequential effect to the prejudice of one who is not a party thereto, does not entitle such person to be made a party to the appeal. If it is necessary to resort to evidence extrinsic to the record upon the appeal in order to show that the reversal will have such effect, the appeal will not be dismissed.

The record to be used on an appeal from an order granting or refusing a new trial consists of the judgment-roll and the bill of exceptions or statement used on the hearing of the motion, with a copy of the order appealed from. (Code Civ. Proc., sec. 661.) There is no "judgment-roll," strictly speaking, in proceedings in probate, but, whenever proceedings in probate are so akin to a civil action as to necessitate the "papers" which are declared by section 670 to constitute the judg-

ment-roll in a civil action, they may be held to constitute the judgment-roll referred to in section 661. In *Bauquier's Appeal*, 88 Cal. 302, it was held that a motion for a new trial is appropriate in proceedings in probate, "whenever the action of the court which is invoked is dependent upon the existence of certain extrinsic facts which are presented to it for determination in the form of pleadings, and are to be decided by it in conformity with the preponderance of the evidence offered thereon," and that an appeal will lie from the order made on the motion for a new trial.

The proceeding instituted in the superior court by the appellant herein is in the nature of a collateral inquiry, or episode, interjected into the proceedings for the administration of the estate, in which there are pleadings, process, trial, findings, and a judgment, thus presenting all the elements of a civil action instituted in an independent suit for the purpose of determining the right of the appellant to a share of the estate, and, in matters of procedure upon an appeal, should receive the same consideration as upon an appeal in a civil action. The proceedings were taken by virtue of sections 1658 to 1660 of the Code of Civil Procedure. Section 1659 provides: "Notice of the application must be given to the executor or administrator personally, and to all persons interested in the estate, in the same manner that notice is required to be given of the settlement of the account of an executor or administrator." The manner in which notice of the settlement of the account of an executor or administrator is to be given is prescribed in section 1633, which requires the clerk to "appoint a day for the settlement thereof, and thereupon give notice thereof by causing notices to be posted in at least three public places in the county, setting forth the name of the estate, the executor or administrator, and the day appointed for the settlement of the account." In the present case personal notice of the application was served upon the executors, and the clerk caused to be posted for five days in three public places, in the city and

county of San Francisco a notice "to all persons interested in the estate" to appear and show cause why the said petition should not be granted. The court thus acquired jurisdiction over all parties interested in the estate to hear the application. Section 1660 provides: "The executor or administrator, or any person interested in the estate, may appear at the time named and resist the application"; and, accordingly, the executors and certain others claiming to be interested in the estate resisted the application and filed answers thereto. The only parties to the record are those who appeared and resisted the application, and they are the only parties who will be affected by a reversal of the order appealed from. The corporations herein referred to, who have not been served with the notice of appeal, did not resist the application, or in any way place themselves upon the record, or make themselves parties to the proceeding; and it is only by resorting to evidence outside of the record that it can be determined whether they are interested in the proceeding, or whether they will be in any way affected if a different result shall be reached upon a new trial. The only issues of fact to be tried in the court below were those presented by the parties who had filed answers to the application, and, as, upon the original trial of those issues, only the parties thereto could claim the right to be heard, so only the parties to those issues are necessary parties to the hearing of an appeal from the order of the court refusing to re-examine the issues.

The motions are denied.

GAROUTTE, J., and VAN FLEET, J., concurred.

[S. F. No. 147. Department One.—December 23, 1895.]

**ESTATE OF MARY DELANEY, DECEASED. MARY A. MCCURRIE, APPELLANT, v. E. J. DELANEY, EXECUTOR, ETC., RESPONDENT.**

**ESTATES OF DECEASED PERSONS—COMMISSIONS OF EXECUTOR—VALUE OF LITIGATED LAND NOT BELONGING TO ESTATE.**—An executor cannot be allowed a claim for commissions upon lands, though included in the inventory of the estate, which were at that time involved in litigation, wherein a final judgment was subsequently rendered adverse to the estate.

**ID.—ADDITIONAL ALLOWANCE.**—The commissions which the statute authorizes to be allowed an executor, is the compensation fixed by law for his care of the property belonging to the estate, and the court is not authorized to make any additional allowance, without a petition therefor showing the rendition of extraordinary services.

**ID.—EXCESS OF CLAIM LESS THAN THREE HUNDRED DOLLARS—APPELLATE JURISDICTION—ORDER SETTLING EXECUTOR'S ACCOUNT.**—The fact that the share of the commissions in excess of the amount which should have been allowed is less than three hundred dollars, cannot defeat the appellate jurisdiction of the supreme court, which has jurisdiction in all such probate matters as may be provided by law, and is authorized to entertain an appeal from an order settling the account of an executor, irrespective of the amount involved.

**ID.—APPEALABLE ORDERS—ORDER SETTLING ACCOUNT—DECREE OF DISTRIBUTION—UNION OF ORDERS.**—An order settling an account, as well as a decree of distribution, is appealable, and the right of appeal from either of these orders is not affected by the fact that both of the orders were made at the same time, and included in the same paper under one signature of the judge.

**ID.—DISMISSAL—SERVICE OF NOTICE OF APPEAL.**—The appeal from the order settling the account will not be dismissed because the notice of appeal therefrom was not served upon any other party than the executor; and where the order settling the account is reversed, it necessarily vacates the decree of distribution, and, in such case, the appeal from the decree will not be dismissed for failure to serve the notice of appeal upon one of the distributees named in the decree of distribution.

**APPEAL from orders of the Superior Court of the City and County of San Francisco settling the final account of an executor and decreeing distribution of the estate of a decedent. J. V. COFFEY, Judge.**

The facts are stated in the opinion of the court.

*F. L. Castlehun, for Appellant.*

*Sawyer & Burnett, and Nicholas Bowden, for Respondent.*

HARRISON, J.—The executor of the last will of Mary Delaney, deceased, presented his final account to the court for settlement and allowance, and, at the same time, petitioned for the distribution of the estate. In his account he included a claim for commissions upon two parcels of land which had been included in the inventory of the estate, but which were at that time involved in litigation wherein a judgment was subsequently rendered adverse to the estate. The appellant, who is one of the heirs, contested this item of the account, but her objections were overruled, and the court settled the account, allowing the executor commissions upon this land, and thereupon made a decree of final distribution. This appeal is taken by her from the order settling the account, and also from the decree of distribution.

These two parcels of land form a portion of Lafayette square, in the city and county of San Francisco, and were in the possession of the deceased at the time of her death, and were afterward taken into possession by the executor, and cared for by him during his administration of the estate. He was allowed for all the expense incurred in thus caring for the property, and was also allowed commissions upon the income received therefrom. It was shown at the hearing that the land was a portion of that included in the action of *San Francisco v. Mooney*, 106 Cal. 586, for the recovery of Lafayette square, and that at the time the court made the order appealed from judgment had been rendered therein in favor of the city and county, and that an appeal therefrom was then pending. This judgment was subsequently affirmed by this court. (*San Francisco v. Mooney, supra.*) This land had been originally appraised at thirty-nine thousand two hundred dollars, and when the account came up for settlement, and the

appellant objected to any allowance of commissions upon its valuation, the court ordered a reappraisement, and, upon such reappraisement, the land was valued at one hundred and nine thousand two hundred dollars, "upon condition that the estate has title to the same." The record does not show at what time this reappraisement was made, or that any further proceedings were had upon the final account until after the filing of the supplemental account. The final account was filed March 30, 1892, and the objections thereto were filed in April, 1892. The supplemental account was filed in November, 1894, and when these accounts were again brought on for settlement the appellant renewed her objections to the allowance of commissions upon this amount, but her objections were overruled.

We are of the opinion that the court erred in allowing the executor commissions upon the value of these two parcels of land. They were a portion of a public square in the city and county of San Francisco, and delineated as such upon the official maps of said city and county, and presumptively were not susceptible of private ownership. The litigation over this square was a matter of public notoriety, and, at the time the order appealed from was made, it had been judicially determined that the city was entitled to its possession. It is not shown by the record upon what basis the allowance of commissions upon this land was fixed by this court, the order settling the account in this respect being: "Said executor should be allowed the sum of fourteen hundred and eighty-seven dollars and fifty cents, as commissions on the estate accounted for by him in said final account, and as compensation for the care of the property belonging to and claimed by said estate." The commissions which the statute authorizes to be allowed an executor, is the compensation fixed by law for his care of the property belonging to the estate, and the court is not authorized to make any additional allowance, unless he shall have petitioned for an allowance therefor, and shown that he has rendered some extra-

ordinary service. (*Estate of Moore*, 96 Cal. 522.) As there is no claim by the executor in the present case that he had rendered any extraordinary service, the order of the court, in awarding him the above amount of commissions, must be construed to be as his compensation for caring for the property belonging to the estate; and, to the extent that it is in excess of the statutory percentage upon the estate that he has accounted for, it is erroneous.

The executor is to be allowed commissions upon the amount of the estate "accounted for" by him (Code Civ. Proc., sec. 1618), and in *Estate of Ricard*, 70 Cal. 69, this phrase was construed as entitling him to commissions upon only such property as belonged to the estate, and for which he would be chargeable in his account. In that case the executors took possession of certain real estate which was held by the testator at the time of his death, and defended an action which was then pending for its recovery; and, when judgment had been rendered against them for its possession, surrendered the same. To their claim for commissions upon the appraised value of the land the court said: "The land itself did not belong to the estate. It was, therefore, no part of its assets, and its value did not form any part of the value of the estate in the possession of the executors for which they were chargeable. Therefore, as it was not legally included in the value of the estate taken into their possession and for which they had to account, they were not entitled to commissions upon it." The reasoning of the court in that case is fully applicable to the present. The only interest of the estate in the land was that of possession, and the judgment of the superior court, that the title to the land was in the city and county, should have been recognized by the court as a reason for disallowing any commissions thereon. The effect of the judgment was to determine that the estate had no title to the land, and, consequently, it did not constitute a portion of the estate to be accounted for by the executor. Although



the judgment had been appealed from, there was no presumption that it would be reversed, and, if it should be affirmed, it could be enforced at any time. It was immaterial that the executor had not surrendered possession of the land. If he had surrendered it upon the entry of judgment, it would not be contended that he should have been allowed commissions upon its value, and, whether he surrenders it before or after the settlement of his account, it is equally evident that it does not constitute a portion of the estate accounted for by him. The fact that the property was in litigation might have been a reason for the court, in the exercise of its discretion, to delay a settlement of the account until the litigation should be determined, but, if the executor would have his account settled at that time and under those circumstances, the court was not authorized to allow him commissions upon the valuation of property which had been determined not to belong to the estate.

The respondent urges that, inasmuch as the appellant's share of these commissions, if they had been disallowed, is less than three hundred dollars, the appeal cannot be entertained. The constitution, however, gives to this court appellate jurisdiction "in all such probate matters as may be provided by law," and the legislature has authorized an appeal from an order "settling an account of an executor," irrespective of the amount involved. (Code Civ. Proc., sec. 963.)

A motion was made by the respondent to dismiss the appeal for failure to serve the notice of appeal upon one of the distributees named in the decree of distribution. This appeal is, however, taken from the order settling the account, as well as from the decree of distribution. Each of these orders is appealable, and, although both were made at the same time, and are included in the same paper under one signature of the judge, the right of appeal from either is not affected thereby. Upon the appeal from the order settling the account the executor was the only adverse party upon whom it was necessary to serve the notice of appeal. As the reversal of the

order settling the account necessarily vacates the decree of distribution, it is unnecessary to determine whether the appeal from that decree has been properly taken.

The orders appealed from are reversed.

GAROUTTE, J., and VAN FLEET, J., concurred.

Modification of judgment denied.

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[No. 16027. Department Two.—December 23, 1895.]

GEORGE P. ROBERTSON ET AL., APPELLANTS, A. H. BURRELL, ADMINISTRATOR, ETC., RESPONDENT.

**ESTATES OF DECEASED PERSONS—ACCOUNTS OF SURVIVING PARTNER—**

**ACTION BY HEIRS—SETTLEMENT WITH ADMINISTRATOR.**—The heirs of a deceased person are not the proper parties to maintain an action for an accounting and settlement of a partnership between the decedent and a surviving partner or his representatives, and they have no legal capacity to do so; but the surviving partner is required to account not with the heirs, but with the executor or administrator of the deceased partner, regardless of whether the partnership assets consist of real or personal property, or both.

**ID.—LACHES—STALE DEMAND—SETTLEMENT OF PARTNERSHIP.**—Where a deceased partner died thirty years before the commencement of an action by his heirs against the administratrix of the surviving partner to compel a settlement of the partnership, and it appears that his widow, the mother of the plaintiff, died seven years after the death of their father, and that no administration was ever had upon the estate of either of them, and that no demand was made upon the surviving partner during his lifetime for a partnership accounting by any one, and the complaint in such action does not aver that the widow did not know of the partnership, nor plead any facts and circumstances showing that discovery of the partnership could not have been sooner made by the plaintiffs, and that plaintiffs have not neglected nor slept upon their rights, the complaint is a stale demand and shows no equity.

**ID.—KNOWLEDGE OF PARTNERSHIP BY MOTHER OF PLAINTIFFS—PLEADING—ADMISSION.**—Where the complaint does not aver that the widow, mother of the plaintiffs, did not know of the partnership, the complaint must be construed as admitting that she did know thereof.

**ID.—JOINT RIGHT OF ACTION—EFFECT OF KNOWLEDGE—BAR OF ANCESTOR AND HEIRS.**—Where a right of action is joint, knowledge which would bar it as to one of the plaintiffs would bar it as to all, whether in law or in equity; and, where a right of action is barred as to the ancestor, it is also barred as to his heirs; and the long silence and inaction of the mother of the plaintiffs, for

seven years after the death of her husband, in connection with the fact that no claim was ever made upon the surviving partner by any one for thirty years, renders the demand of plaintiffs stale, though they were minors at the time of the father's death.

1D.—DEATH OF ORIGINAL PARTIES—SCRUTINY OF PLEADING—SHOWING OF DILIGENCE.—After the lapse of a long time, and after the death of all the original parties, equity, for the peace of society, scrutinizes a bill for an accounting with great particularity, and is not satisfied to retain it unless the fullest possible credible showing of diligence is made by the applicants for relief; and it is not sufficient to allege innocence at one time, and discovery at another, but the facts and circumstances must be pleaded, in order that the court may determine whether the sources of knowledge availed of were not at all times open to the plaintiffs, whether they were negligently overlooked, whether other circumstances should not earlier have put plaintiffs upon discovery, and what was the nature of the concealment practiced, if any, stating whether it consisted in mere silence, or was accompanied by active misrepresentation and fraudulent deception.

1D.—AMENDMENT OF PLEADING—DISCRETION—REQUEST—PRESUMPTION. Leave to amend a defective complaint, while addressed to the discretion of the court, should be liberally granted to subserve the ends of justice; and, in any ordinary case of absence of averment, or of insufficient averment, it is an abuse of discretion to refuse leave to amend; but, where there is no right to maintain the bill, and no request is made for an amendment, error will not be presumed in not allowing it.

APPEAL from a judgment of the Superior Court of Santa Clara County. W. G. LORIGAN, Judge.

The facts are stated in the opinion of the court.

*J. A. Hannah, and Horace L. Smith, for Appellants.*

The want of legal capacity to sue only goes to the legal disability of plaintiffs, such as infancy, idiocy, coverture, or the like. (*De Bolt v. Carter*, 31 Ind. 355; *People v. Crooks*, 53 N. Y. 648; *Pomeroy on Remedies*, sec. 208.) Upon the death of the ancestors the legal and equitable title vested absolutely in the heirs subject to the payment of the debts of the intestate. (Civ. Code, sec. 1384; *Brenham v. Story*, 39 Cal. 179, Stats. 1850, Descents and Distributions, sec. 1; *Jahns v. Nottling*, 29 Cal. 508; *Janin v. Browne*, 59 Cal. 37; Civ. Code, sec. 1384, and note; *Smith v. Olmstead*, 88 Cal. 582; 22 Am. St. Rep. 336.) The heirs were the proper parties to maintain this action, being the real parties in interest.

(Code Civ. Proc., sec. 367; *Ord v. De La Guerra*, 18 Cal. 67; *Bettis v. Townsend*, 61 Cal. 333; *Little v. Caldwell*, 101 Cal. 553; 40 Am. St. Rep. 89; Pomeroy on Remedies, sec. 138; Van Santvoord's Equity Pleading, 141; Story's Equity Pleading, secs. 72, 207.) It was error to dismiss the bill for nonjoinder of necessary parties. It should have been retained, and the necessary parties ordered brought in. (Story's Equity Pleading, sec. 91; Code Civ. Proc., sec. 389.) The complaint shows an express or voluntary trust, and the statute has no application until repudiation and notice to the beneficiary. (Civ. Code, secs. 2216-24, 2410; *Roach v. Caraffa*, 85 Cal. 445; *Ord v. De La Guerra*, *supra*; *Schroeder v. Jahns*, 27 Cal. 274; *Bell v. Hudson*, 73 Cal. 285; 2 Am. St. Rep. 791; 1 Pomeroy's Equity Jurisprudence, sec. 152; 2 Pomeroy's Equity Jurisprudence, sec. 1010, note 1; Perry on Trusts, 2d ed., sec. 863; *Speidel v. Henrici*, 120 U. S. 386, and cases cited. See note to same case, 15 Fed. Rep. 753; Wood on Limitations, sec. 200; *Baker v. Joseph*, 16 Cal. 173; *Janes v. Throckmorton*, 57 Cal. 368; *Luco v. De Toro*, 91 Cal. 405; *Duff v. Duff*, 71 Cal. 515; *Lataillade v. Orena*, 91 Cal. 565; 25 Am. St. Rep. 219; *Williams v. Dennison*, 94 Cal. 540.) The discovery of the acts constituting the fraud is the ultimate fact, and how or under what circumstances are merely evidentiary. There is nothing from which the court can infer that the fraud ought to have been discovered earlier. (Pomeroy's Equity Jurisprudence, 2nd ed., sec. 917, note 2; Perry on Trusts, sec. 861.) No laches can be imputed until discovery of the fraud or facts upon which the action is based. (Pomeroy's Equity Jurisprudence, sec. 917; Perry on Trusts, 3rd ed., sec. 230, and cases cited in note 2. See, also, authorities collected in 12 Am. & Eng. Ency. of Law, p. 547, note 3, and p. 548, note 1.)

*E. O. Larkins*, and *S. F. Leib*, for Respondent.

An action for a general accounting of all the partnership property brought against the surviving partner cannot be brought by any one except the executor or

administrator of the deceased partner. (Code Civ. Proc., 1585; Lindley on Partnership, secs. 494, 611; Bates on Partnership, sec. 924; 17 Am. & Eng. Ency. of Law, 1277, 1278, and cases cited; *Dias v. Phillips*, 59 Cal. 293; *Smith v. Walker*, 38 Cal. 392; 99 Am. Dec. 415; Boone's Code Pleading, 82; *Gates v. Lane*, 44 Cal. 396; Code Civ. Proc., 389.) The administrator has the sole right to maintain an action to recover debts. (*Grattan v. Wiggins*, 23 Cal. 29; *Harwood v. Marye*, 8 Cal. 580.) The information leading to the discovery of the facts must be specifically alleged, so the court can see whether any stronger information was then obtained than that already possessed by the complainants. (*Hardt v. Heidweyer*, 152 U. S. 547, and cases cited.) The plaintiffs were guilty of laches. The allegations of the bill are only equivalent to saying that plaintiffs never made any inquiries for thirty years, and, when made, the facts were easily ascertainable. (*Wood v. Carpenter*, 101 U. S. 135; *Stearns v. Page*, 7 How. 819; *Felix v. Patrick*, 145 U. S. 317; *Hammond v. Hopkins*, 143 U. S. 224; *Hardt v. Heidweyer*, *supra*; *Teall v. Slaven*, 40 Fed. Rep. 774; *Jones v. Smith*, 38 Fed. Rep. 380; *Foster v. Mansfield etc. R. R. Co.*, 146 U. S. 88; *Wollensak v. Reiher*, 115 U. S. 96; *Horbach v. Marsh*, 37 Neb. 22; *Gillespie v. Cooper*, 36 Neb. 775; *Parker v. Kuhn*, 21 Neb. 413; 59 Am. Rep. 838; *Pearsall v. Smith*, 149 U. S. 331; *Chapman v. Bank of California*, 97 Cal. 155; *Seculovich v. Morton*, 101 Cal. 673; 40 Am. St. Rep. 106; *Burling v. Newlands* (Cal. Jan. 5, 1895), 39 Pac. Rep. 49; *Bills v. Silver King Min. Co.*, 106 Cal. 9; *Hecht v. Slaney*, 72 Cal. 366, 367.) The means used to effect the concealment must be specifically alleged. (*Badger v. Badger*, 2 Wall. 94, 95; *Godden v. Kimmell*, 99 U. S. 211; *Teall v. Slaven*, *supra*; *Wood v. Carpenter*, *supra*.) The general allegation of ignorance at one time and discovery at another is of no avail. The court must be able to see from the facts whether the discovery ought not to have been made before. (*Wood v. Carpenter*, *supra*; *St. Paul etc. Ry. Co. v. Sage*, 49 Fed. Rep. 319, and cases cited; *Hammond v.*

*Hopkins, supra; Teall v. Slaven, supra.*) The knowledge of the partnership by one of the joint heirs is knowledge of all, and one being barred, either by laches or limitations, all the other joint owners would be barred also. (*Shortridge v. Allen*, 2 Tex. Civ. App. 193; *Jones v. Smith, supra; Marsteller v. M'CLean*. 7 Cranch, 156; *Moore v. Armstrong*, 36 Am. Dec. 77, note; *Rogers v. Van Nortwick*, 87 Wis. 414; *Robertson v. Smith*, Litt. Sel. Cas. 296; 12 Am. Dec. 304; 13 Am. & Eng. Ency. of Law, 771.) The surviving partner was not a trustee of an express trust. He took a partnership property as the surviving legal owner. (Bates on Partnership, sec. 717; *Williams v. Whedon*, 109 N. Y. 333; 4 Am. St. Rep. 460; *Barry v. Briggs*, 22 Mich. 206; Civ. Code, sec. 1384, prior to amendment of March, 1874. (The right to an accounting is barred by the statute of limitations the same as any other action. (*M'Clung v. Capehart*, 24 Minn. 17; *Wells v. Brown*, 83 Ala. 161; *Gilmore v. Ham*, 142 N. Y. 1; 40 Am. St. Rep. 554; *Guldin v. Lorah*, 141 Pa. St. 109; *Richardson v. Gregory*, 126 Ill. 166.)

HENSHAW, J.—Appeal from a judgment entered after demurrer sustained. Plaintiffs are the surviving heirs of their father, Eldridge G. Robertson, who died in the year 1864, and of their mother who died in the year 1871. No administration was ever had upon the estate of either. They allege that in the year 1862 their father formed a partnership with one Cuthbert Burrell, each partner contributing thereto property of the value of five thousand dollars. The agreement was that as partners the two should engage and co-operate in the business of raising, buying and selling stock, transacting a general farming business, and dealing in real estate and other property in the state of California, as full and equal partners. The business of the partnership was carried on for about two years, when their father died. At the time of his death the assets of the partnership had swelled in value to the sum of one hundred thousand dollars. Cuthbert Burrell continued in

control and management of this property until his death in 1893, at which date the assets amounted to one million dollars. All of the property possessed by Cuthbert Burrell at the time of his death was property of the partnership.

Soon after the death of their father, Burrell moved plaintiffs (then minors) and their mother to Oakland, California, where the children, excepting one, were placed in an asylum, and so grew to majority. "Cuthbert Burrell concealed from their mother the fact that her husband, the father of plaintiffs, was a partner with Burrell, and that she and her children were entitled to one-half of the property which belonged to said partnership, or that she, or her children, were entitled to receive and demand of him one-half of the sum of one hundred and three thousand dollars, for which he sold a part of the cattle belonging to said partnership."

"The plaintiffs, at the time of the death of their father, were of tender years, and the said Cuthbert Burrell, during his lifetime, concealed from them the fact that a partnership existed between him and their father, or that he held any money or property in trust for them, and they have only discovered the fact of the existence of the said partnership since the death of the said Cuthbert Burrell, viz., on or about February 6, 1894. That statements made by Cuthbert Burrell to Esther E. Phelps in his lifetime, and a short time before his death, caused her to make inquiry concerning the property her father had in his lifetime, and such inquiry led to the discovery of the said partnership which existed between their father and Cuthbert Burrell, and facts hereinbefore set out."

The foregoing quotations contain all of the averments of the complaint as to concealment, diligence, and discovery of the alleged fraud. Burrell never accounted during his lifetime, and, after his death, demand for an accounting was made upon defendant, his administratrix, and refused.

The action is brought to compel an accounting. It

is asked that a receiver be appointed in the interim to take charge of all of the dead man's estate, as being partnership property.

The demurrer was properly sustained. Plaintiffs are not the proper parties to maintain this action, and they have not legal capacity to do so. While, in a sense, they are beneficiaries of the trust which resulted by the death of their father, the fulfillment of which was imposed upon the surviving partner, yet there were certain intermediate steps and processes necessary to be taken and followed before their beneficial interests could be reduced to possession. And it is these necessary processes which the action under consideration entirely ignores. For there was another trust intervening in time and right and duties between the close of the surviving partner's trust and their enjoyment of its fruits. It is true that as heirs of their father the title to his property, real or personal, vested in them, but their title did not carry with it the right of immediate enjoyment. The rights and duties of the administrator of their father's estate interposed and intervened. The administrator, also, is a trustee with well-defined duties, among the first of which is that of collecting the assets of the estate and paying its just debts after due notice to creditors. The heirs' title is subject to the performance by the administrator of all his trusts, and they finally come into the possession and enjoyment of only such portion of the estate as may remain after the execution of them by the administrator.

Section 1585 of the Code of Civil Procedure gives to the surviving partner the right to continue in the possession of the partnership property, and imposes upon him the duty of settling its affairs without delay. He is required to account, not with the heirs, but with the executor or administrator. This duty of the surviving partner is the correlative of the right of the personal representative, and fixes the person in whom the right of action exists. If he is to account with the



administrator, the administrator it must be who has the right to call him to account.

Sections 369, 1581, and 1582 of the Code of Civil Procedure broadly define the powers of administrators in matters of litigation. They may sue without joining the heirs or beneficiaries. Section 1452 of the same code permits the heirs in designated kinds of actions affecting the title to real estate to sue without joining the personal representative. This section was construed and held to apply in the case of *Janes v. Throckmorton*, 57 Cal. 368-87. There the action was brought to enforce a trust, and, as the court with emphasis points out, to compel a conveyance of the legal title to real estate. But here the trust sought to be established is a trust growing out of a partnership relation exclusively. Whether the partnership assets consist of real or personal property, or both, is quite immaterial, since in every case it is made the duty of the surviving partner to account with the personal representative. Nor is *Ord v. De la Guerra*, 18 Cal. 67, in point for appellants. There, upon the death of his wife, the husband, as was proper, continued in management and control of the community property, though a distinct interest in the property vested in the heirs of the wife under the Mexican law. Upon the husband's death without an accounting to her heirs, they sued his representatives to recover their share of the property. The court's decision was largely based upon the opinion expressed, that there was no necessity for taking out administration upon the wife's estate under the old system of the Mexican law. "We see no difficulty in giving to the right of the heir, whether arising out of a past system or the present, the same remedy which we would apply in the case of a representative at common law of a surviving partner in a commercial partnership, distribution of partnership effects left after settlement of the firm debts in the hands of such survivor." *Bettis v. Townsend*, 61 Cal. 333, involved no question of partnership nor rights of representatives. "It was a trust re-

lating to personal property, and could be taken advantage of by the beneficiaries, the present plaintiffs. (Civ. Code, sec. 2251.)" In *Little v. Caldwell*, 101 Cal. 553, 40 Am. St. Rep. 89, the widow of deceased sued her husband's surviving partner; but the foundation of her claim was an alleged contract between herself and the defendant entered into after her husband's death. The action did not involve any claim for a general accounting.

Upon the other hand, though the heir succeeds to the ownership of the property, real or personal, he is not thereby given full dominion and control over it. In *Smith v. Walker*, 38 Cal. 385, 99 Am. Dec. 415, the administrator prosecuted his action for an accounting against the surviving partner, and the court said: "He represents the *entire estate*, . . . . Till then (distribution) the administrator is entitled to the possession and control of the *entire estate*. Till he recovers the whole estate the amount to be distributed cannot be known."

In *Bell v. Hudson*, 73 Cal. 285, 2 Am. St. Rep. 791, the action, in nature identical with this, was properly brought by the administrator.

Nor can the heir, by any act of his own, strip the representative of any of his rights, nor relieve him from the performance of any of his duties. The heir may sell his interest, but the administrator still has control of the property sold for the payment of debts and the general purposes of administration. The heir cannot bring an action to enforce payments or collect debts (*Harwood v. Marye*, 8 Cal. 580; *Grattan v. Wiggins*, 23 Cal. 29); and, even when he attempts to do so by suing in his individual capacity and as executor, the right of action not being in both, but in the executor alone, a demurrer will be sustained. (*Dias v. Phillips*, 59 Cal. 293.)

So much has been said upon the law of our own code provisions and the cases interpreting them. But, it may be added, that elsewhere the authorities are uniform that the personal representative alone has the right

to maintain such an action, saving in those exceptional cases, of which this is not one, where the personal representative by fraud or otherwise is disqualified. (Parsons on Partnership, sec. 344, and note; Story on Partnership, secs. 342-47; Lindley on Partnership, \*494, 611; Bates on Partnership, sec. 924; 17 Am. & Eng. Ency. of Law, 1277.)

In contemplation of further litigation it may be well to consider briefly certain other objections urged to this bill upon demurrer. They are, generally, that the bill is a stale demand and shows no equity. The attack is directed to the insufficiency of the portions of the bill above quoted. It appears from the pleading that the men engaged in a partnership to which they gave their personal care and attention. Each contributed to it property of the value of five thousand dollars. At the time of Robertson's death he was still actually engaged in its business, and the value of his interest had increased to fifty thousand dollars. Yet, after his death, no administration is taken out upon his estate, and no demand made upon Burrell for a partnership accounting by any one. It is not averred that the widow, mother of the plaintiffs, did not know of the partnership, and this must be construed as an admission that she did know (*Hecht v. Slaney*, 72 Cal. 363), and, indeed, it would be surprising if she did not. Where the right of action is joint, knowledge which would bar it as to one would bar it as to all, either in law or in equity (Freeman on Cotenancy, sec. 375; Wait's Actions and Defenses, 279; *Jordan v. M'Kenzie*, 30 Miss. 32; *Hardman v. Sims*, 3 Ala. 747); and where a right of action is barred to the ancestor it is barred to his heirs. (*Shortridge v. Allen*, 2 Tex. Civ. App. 193.)

The widow's long silence and inaction under these circumstances, taken with the fact that no claim was ever made upon the surviving partner, would render the demand stale. (*Bell v. Hudson*, *supra*.)

Moreover, after the lapse of so much time, and after the death of all the original parties, equity, for the peace

of society, scrutinizes with great particularity bills such as this, and is not satisfied to retain one unless the fullest possible credible showing is made by the applicants for relief. (*Bills v. Silver King Min. Co.*, 106 Cal. 9; *Chatman v. Bank of California*, 97 Cal. 155; *Felix v. Patrick*, 145 U. S. 317, 333; *Wood v. Carpenter*, 101 U. S. 135, 143.) It is not sufficient, therefore, to allege ignorance at one time and discovery at another. The facts and circumstances must themselves be pleaded in order that the court may determine whether the sources of knowledge at last availed of were not at all times open to plaintiffs, whether they were negligently overlooked, whether other circumstances should not earlier have put plaintiffs upon discovery, what was the nature of the concealment practiced, whether it consisted in mere silence, or was accompanied by active misrepresentation and fraudulent deception. In this bill, upon all these pertinent matters of pleading, where there is not an absolute absence of averment (as of the ignorance of the widow) there is but a fleshless skeleton of allegation. Plaintiffs only discovered the fact of the existence of the partnership after the death of Burrell. The matter leading to the discovery was statements made by Burrell a short time before his death to one of the heirs, which led her to make inquiry. What the statements were; how long before his death they were made; whether or not due diligence after their making would not have resulted in discovery during Burrell's lifetime; why, if Burrell's policy was concealment, he should at last have made to one of the heirs declarations so pregnant with meaning that they led to discovery; what were the inquiries which the heir made and which resulted in discovery; of whom were they made, and why were they not made years before, are all questions which, upon the demand of the demurrer, should be answered by the bill in order that the chancellor, to whose conscience, in the first instance, the equity of the bill is addressed, should satisfy himself that plaintiffs have not neglected

or slept upon their rights. (*Hardt v. Heidweyer*, 152 U. S. 547.)

It is claimed that the defects could be cured by amendment, and that an amendment should have been permitted. Leave to amend, while addressed to the discretion of the court, should be liberally granted to subserve the ends of justice. And in any ordinary case of averment, or of insufficient averment, we should hold it to be an abuse of discretion to refuse leave to amend. But here, not only plaintiffs could not file a sufficient bill for the reason first above discussed, but they did not ask leave to amend, and error will not be presumed. (*Smith v. Taylor*, 82 Cal. 541; *Buckley v. Howe*, 86 Cal. 605.)

The judgment appealed from is affirmed.

McFARLAND, J., and TEMPLE, J., concurred.

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[No. 15819. Department Two.—December 23, 1895.]

FREDERICK SCHLICKER, RESPONDENT, v. D. D. HEMENWAY, PERSONALLY, AND AS ADMINISTRATOR, ETC., APPELLANT.

ESTATES OF DECEASED PERSONS—INVALID SALE OF LAND—ORDER FOR AUCTION—PRIVATE SALE—CONFIRMATION—WANT OF JURISDICTION. Where the land of a deceased person is ordered to be sold at auction, and the return of the sale made by the executor shows that the land was sold at private sale, and not at public sale, as directed in the order of sale, the sale is void on the face of the record, and the court has no power to confirm it.

ID.—DEPOSIT OF PURCHASE MONEY WITH EXECUTOR—REPRESENTATIVE CAPACITY—LIABILITY OF ESTATE.—A deposit on account of purchase money with the executor by the purchaser at such void sale is not received by the executor in his representative capacity, he having no right to demand or receive it; and the estate is not liable to the purchaser for a return of the deposit unless it be shown that it has been actually made a part of the assets of the estate, through being accounted for to the estate, or actually used for its benefit.

ID.—ACTION TO RECOVER DEPOSIT—MISJOINDER OF PARTIES AND CAUSES OF ACTION—AMBIGUITY AND UNCERTAINTY.—Where an action is brought to recover the deposited purchase money paid to the

executor, against the executor individually, and also as executor of the estate, the complaint is demurrable on the ground of misjoinder of parties and of causes of action, and, where it does not show clearly whether it is sought to charge the executor personally or the estate, or both of them jointly, it is demurrable for ambiguity and uncertainty; and it is also demurrable upon the ground that it does not state a cause of action against the defendant as representative of the estate.

APPEAL from a judgment of the Superior Court of Sonoma County. R. F. CRAWFORD, Judge.

The facts are stated in the opinion of the court.

*J. P. Rodgers*, for Appellant.

The complaint does not state a cause of action against D. D. Hemenway personally, and hence the judgment against him is invalid, and should be reversed. (*Freeman on Judgments*, 2d ed., secs. 116, 118, 120.) There is a misjoinder of parties defendant, in that D. D. Hemenway is sued personally and as executor of the last will of Greenbury Hinkston, deceased. For such misjoinder of parties the demurrer should have been sustained. (*Hibernia Savings etc. Soc. v. Ordway*, 38 Cal. 681; *Rutenberg v. Main*, 47 Cal. 221; *Haverstick v. Trudel*, 51 Cal. 434; *Dias v. Phillips*, 59 Cal. 294.)

*Haskell & Meyer*, for Respondent.

TEMPLE, J.—This is an appeal taken from a judgment rendered because defendants declined to answer after their demurrer was overruled.

The action is brought against defendant individually, and as executor of the estate of Greenbury Hinkston, deceased, to recover seven hundred and fifty dollars, received by Hemenway under the following circumstances, as set out in the complaint:

An order of sale was made in the estate, authorizing and directing the executor to sell certain real estate at public auction. The executor negotiated a private sale to plaintiff, and reported it to the court as a private sale. In the probate court, when the matter of the confirmation came up, plaintiff increased his bid from six

thousand dollars to six thousand eight hundred dollars. The sale was then confirmed to him. At the time of making the bid he put up, as required, seven hundred and fifty dollars. Plaintiff refused to complete his purchase, and, therefore, the order of confirmation was vacated, and the property resold. The complaint does not show whether it brought more or less than the offer of plaintiff. Plaintiff demanded the return to him of the seven hundred and fifty dollars, and, as the defendant declined, he brought this action.

The complaint was demurred to on various grounds, and, among others, on the ground that there is a misjoinder of parties defendant, in that Hemenway, as an individual, is joined with the representative of the estate of Hinkston, when the complaint not only fails to show a joint or joint and several liability, but shows that both cannot be liable. Also, that there is a misjoinder of causes of action, with specifications very nearly as above. Also, that the complaint is ambiguous, because it cannot be ascertained therefrom whether it is sought to charge Hemenway or the estate. Also, uncertain for the same reason.

The demurrer should have been sustained on all these grounds. The complaint is also specially demurred to on the ground that it does not state a cause of action against Hemenway, and, separately, that it does not state a cause of action against the representative of the estate. The cause of action is based, generally, upon the proposition that because the return of the sale made by the executor shows that the land was sold at private sale, and not at public sale as directed in the order of sale, the court had no jurisdiction to confirm it, or, at least, that the sale was void on the face of the record. I think this must be conceded.

Then did the executor receive the money in his representative capacity? If he had taken the money to make good a bid which he had a right to receive, it might have been contended with some plausibility that he received it in his representative capacity. But, in-

asmuch as he had no right to demand or to receive the money, because the sale in that mode was void, I think the estate is not liable unless it be further shown that it has been actually made a part of the assets of the estate, through being accounted for to the estate, or actually used for its benefit. Suppose, for instance, the executor had been required to give no bonds and was irresponsible and had embezzled the money, could the plaintiff have sued his successor in office and compelled the estate to pay it? If so, why? The bid was not authorized by the order of sale. As executor he had no right to receive the money, and it was not received in the discharge of any official duty.

I do not concede that, even had the executor received the money in his official character, the estate would be liable for it; but, waiving that question, I think it evident that here the estate cannot be held.

Judgment reversed, and cause remanded with direction to sustain the demurrer.

McFARLAND, J., and HENSHAW, J., concurred.

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[No. 14808. Department Two.—December 23, 1895.]

**A. DIXON, APPELLANT, v. H. SCHERMEIER, RESPONDENT.**

**EASEMENT—WATER DITCH—SERVITUDE.**—A water ditch constituting an independent property disassociated from the land over which it passes, though it may be an easement in gross, is a servitude upon the land.

**ID.—UNITY OF TITLE—EXTINGUISHMENT OF SERVITUDE.**—When the owner of the land over which the ditch passes becomes the owner of the ditch, the servitude is extinguished by unity of title during the time that such unity of title may continue.

**ID.—DITCH APPURTENANT TO DISTINCT MINING CLAIMS.**—Where a ditch, as an artificial watercourse, is apparently necessary to the working of two distinct mining claims owned by the owner of the ditch, it becomes an appurtenance to each of the mining claims.

**ID.—MORTGAGE UPON ONE CLAIM—SEVERANCE OF TENEMENTS—EASEMENT OF WAY.**—The execution of a mortgage upon one of the two mining claims to which the water ditch is an appurtenance, creates, potentially, a severance of the tenements to which the



ditch is appurtenant, and where the ditch crosses the mortgaged claim to the other mining claim to which the ditch is also appurtenant, and which is not included in the mortgage, an easement of way for the ditch over the mortgaged claim is reserved in the mortgage by implication of law in favor of the other mining claim.

1D.—SUBSEQUENT MORTGAGE UPON EASEMENT—FORECLOSURE OF FIRST MORTGAGE—DISCLAIMER—EXTINGUISHMENT OF LIEN.—A subsequent mortgage of the other mining claim covers the easement reserved by implication of law in the former mortgage; and in a suit to foreclose the former mortgage the subsequent mortgagee may assert a lien on the easement of way for the ditch over the first mortgaged claim; but by disclaiming any interest in the land which is the subject of that suit, the judgment of foreclosure of the prior mortgage founded on such disclaimer, and the sale and deed thereunder, extinguishes the lien of the subsequent mortgagee on every part of the first mortgaged claim, including the easement of way and the section of the ditch lying above that claim which, as an appurtenance thereof, was included in the disclaimer; and a purchaser at a sale under foreclosure of the second mortgage acquires no interest in the ditch beyond the boundary of the claim subsequently mortgaged.

APPEAL from a judgment of the Superior Court of Placer County. B. F. MYRES, Judge.

The facts are stated in the opinion.

*F. P. Tuttle*, for Appellant.

None of the elements exist which are necessary to constitute the ditch and water right an appurtenant to the Hoffman claim. (Civ. Code, sec. 662; *Quirk v. Falk*, 47 Cal. 454.) When the ditch was dug and water appropriated, it became a separate and distinct property, a corporeal hereditament, not an easement. (*Hurlbutt v. Butenop*, 27 Cal. 57.) Merger is a question of intention, and the intention of the parties may be presumed from what is to his best and highest advantage. (*Rumpp v. Gerkens*, 59 Cal. 496.)

*J. E. Hale* (for *Hale & Craig*), for Respondent.

The ditch was and is affixed to, and is incidental or appurtenant to, the Hoffman land and claim. (Civ. Code, secs. 660, 662.)

BRITT, C.—In the year 1873 the United States issued to one F. Hoffman a patent for certain mining ground,

one hundred and sixty and seventy-seven one hundredths acres in area, called by the parties here the "Hoffman placer claim." On the easterly and lower side of this, though not quite contiguous to it, lay another parcel of mining ground containing some fifty-eight acres, and called the "Smith placer claim." At the date of said patent there was, and is yet, a water ditch heading about half a mile above the Hoffman claim, and extending through the same to a reservoir a few rods within the eastern boundary thereof, and thence on to the Smith claim, a total distance of about three miles, half of which entire length is included in the Hoffman tract or claim. Mining on both the Hoffman and Smith claims, and to some extent elsewhere, has been carried on by means of water drawn through this ditch; though the ditch was originally constructed—as early as 1855—and has been mainly used, to work the Smith claim. Said Hoffman became the owner of the ditch in 1875; it does not appear that he could, or ever did, make use of the same, except in connection with said two placer claims.

Plaintiff's action is for the purpose of quieting his alleged title to the ditch. He founds his right on:

1. A mortgage executed by said Hoffman, November 13, 1883, to plaintiff and one Tillotson, upon said Smith mining claim and said water ditch, Hoffman, it seems, having become the owner of the Smith claim;
2. Judgment in an action begun December 5, 1887, by Dixon & Tillotson, for the foreclosure of such mortgage, which judgment was rendered February 6, 1888, and directed the sale of the mortgaged property;
3. Sheriff's deed, dated February 8, 1889, made to plaintiff Dixon as purchaser of the property at the sale under such judgment.

But on September 15, 1880, several years before the mortgage to which plaintiff traces his title, Hoffman mortgaged to one Elsen and others the land described in said patent to him—the "Hoffman placer claim"—and all the appurtenances thereto, to secure certain indebtedness to fall due May 1, 1881. In 1885 the mort-

gagees in this instrument instituted an action for the foreclosure thereof, and Dixon & Tillotson were made parties defendant. They filed an answer, in which they denied "that they have, or claim to have, any interest whatsoever, either by mortgage or otherwise, in the land described in the mortgage sought to be foreclosed in this action." Such action resulted in a judgment of foreclosure in favor of Elsen and his comortgagees, under which the property mortgaged to them was sold on September 4, 1886, to Schermeier, the present defendant; no redemption being effected, Schermeier received, April 28, 1888, a deed of the property so purchased by him, and thereunder claims to be the owner of the ditch within the limits of the Hoffman claim, and above to the head of the ditch; he has had possession of the same since the date of sale, September 4, 1886.

It may be, as contended by plaintiff, that prior to the acquisition of title to the ditch by Hoffman in 1875, it constituted an independent property, disassociated from the land over which it passed—an easement in gross (See *Coonradt v. Hill*, 79 Cal. 590; yet as such it was a servitude upon the land (*Smith v. Hawkins*, ante, p. 122; *Ware v. Walker*, 70 Cal. 595; Civ. Code, sec. 802, subd. 5); and when Hoffman became the owner of both ditch and lands the servitude was, for the time such unity of title might continue, extinguished. (Civ. Code, 805, 811; Gould on Waters, sec. 318.) Assuming, as we may, and this is probably the view more favorable to appellant, that Hoffman was the owner of the Smith claim in 1880, when he mortgaged the Hoffman claim, then the ditch, an artificial watercourse apparently necessary to the working of both claims, was an appurtenance to each of them. (Civ. Code, 662; *Crooker v. Benton*, 93 Cal. 365; *Standart v. Round Valley etc. Co.*, 77 Cal. 399; *Fitzell v. Leaky*, 72 Cal. 477; *Farmer v. Ukiah Water Co.*, 56 Cal. 11.) The title of a purchaser at a sale made under foreclosure of a mortgage has relation to the date of the mortgage (*Horn v. Jones*, 28 Cal. 194); hence, by the execution of the mortgage of

1880, Hoffman created, potentially, a severance of the tenements to which the ditch was appurtenant, and it follows that, although this mortgage was a lien on the Hoffman claim, and upon the ditch as an appurtenance thereto, yet an easement of way for the ditch over the Hoffman claim was reserved from that mortgage by implication of law in favor of the Smith claim; such easement was included in the mortgage of 1883. (*Quinlan v. Noble*, 75 Cal. 250, and cases cited; *Oakley v. Stanley*, 5 Wend. 523; *Huttemeier v. Albro*, 18 N. Y. 48; Gould on Waters, secs. 313, 314, 354.) Accordingly, when Dixon & Tillotson were made defendants in the suit to foreclose the mortgage of 1880, they could have asserted their lien in virtue of the mortgage of 1883 on such easement in the Hoffman claim, and have litigated with the mortgagees substantially the same issue Dixon is now waging with defendant here. (*Tolman v. Smith*, 85 Cal. 280.) But they expressly disclaimed any interest in the land which was the subject of that suit; and the judgment there, founded on such disclaimer, and the sale and deed to Schermeier, extinguished the lien they had on every part of the Hoffman claim, including the section of the ditch lying above the mining claim, which, as an appurtenance thereof, was included in the disclaimer. It results that Dixon, as purchaser at the sale under the judgment obtained by himself and Tillotson, acquired no interest in the ditch above the easterly line of the Hoffman claim. (*Reynolds v. Hosmer*, 51 Cal. 205.)

The judgment and order appealed from should be affirmed.

VANCLIEF, C., and BELCHER, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

McFARLAND, J., TEMPLE, J., HENSHAW, J.

[Sac. No. 89. In Bank.—December 23, 1895.]

**F. G. WARD, AS SHERIFF, ETC., RESPONDENT, v. MATT. HEALY, APPELLANT. M. ASHER, ASSIGNEE, INTERVENOR AND RESPONDENT.**

**APPEAL—PRINTING AND FILING OF TRANSCRIPT—DEPOSIT WITH CLERK—CONSTRUCTION OF RULE XII.**—Rule XII of the supreme court, which provides that the written transcript in civil cases may be filed with the clerk of the court if, when presented for filing, it be accompanied with sufficient funds to pay the expenses of printing, and that the clerk, upon receipt thereof, shall cause the transcript to be printed, etc., should be strictly enforced and obeyed as written, and a deposit of the transcript with the clerk, without the funds necessary to pay for the printing, is not in compliance with the rule.

**ID.—MOTION TO DISMISS APPEAL—FILING OF TRANSCRIPT AFTER NOTICE OF MOTION—TRANSIT OF TRANSCRIPT.**—Where a motion to dismiss an appeal and the printed transcript were filed upon the same day, the appellant's rights are not saved thereby, if the transcript was not filed before the notice to dismiss was served; nor is the fact that the printed transcript was in the office of the express company in transit to the clerk for filing when the motion to dismiss was served, the equivalent of filing the transcript within rule V of this court.

**ID.—EXCUSE FOR FAILURE TO FILE TRANSCRIPT—AGREEMENT WITH CLERK.**—While no understanding or agreement between the clerk of the court and the appellant's attorney can dispense with a compliance with rule XII of the court, or give appellant any right in law to rely upon any such understanding, yet, where that rule has not been heretofore construed, and appellant's attorney, relying upon an agreement with the clerk, whereby the clerk, though without authority, in effect waived the payment of funds provided for by the rule, and consented to the printing of the transcript for him by appellant's attorney, which was printed without unnecessary delay, *held*, that the failure to file the printed transcript is so far excused by the circumstances that the appeal should not be dismissed for noncompliance with rule XII.

**APPEAL** from a judgment of the Superior Court of Lassen County and from an order denying a new trial.  
**W. T. MASTEN, Judge.**

The facts are stated in the opinion of the court.

*Spencer & Raker, and F. C. Spencer, for Appellant.*

*Shinn & Shinn, for Respondent.*

**GAROUTTE, J.**—This is a motion to dismiss an appeal upon the ground of failure to file the printed transcript

within the time provided by law. Rule XII of this court provides that a written transcript in civil cases may be filed with the clerk of this court if, when presented for filing, it be accompanied with sufficient funds to pay the expenses of printing the same, and that the clerk, upon receipt thereof, shall cause the transcript to be printed, and to the printed copy shall annex his certificate, etc. Appellant, in line with the foregoing rule of the court, transmitted to the clerk the written transcript, with a request that it be filed, but failed to accompany it with the funds to pay for printing the same. In lieu thereof, he asked the clerk to allow him the privilege of having the transcript printed at his home printing office at his own expense, and the clerk granted such request. The printing of the transcript was proceeded with, and some forty-eight days thereafter the printed copy was served, and also filed as provided by the rule. The motion to dismiss the appeal was served upon appellant prior to the time when the printed transcript was actually filed in the office of the clerk of this court.

Appellants seldom invoke the provisions of the rule of court heretofore referred to, and, as a consequence, the true construction thereof has never been a question presented for decision. But they are often desirous of delay in the decision of questions pending upon their appeals, and it is plainly apparent that, if we should indorse the practice here adopted as one justified by the rule, grave abuses would inevitably result, and the delays in litigation be more aggravated. We think the rule should be strictly enforced, that it should be obeyed as written, and, when it says that the funds necessary to pay for the printing of the transcript should accompany it, when transmitted to the clerk of this court, the provision should be upheld, and a compliance therewith demanded. With funds in hand, the clerk has the means, and also the opportunity, to have the work done promptly and well, and work which the appellant's attorneys were in this case more than forty days in hav-

ing done, the clerk could probably have had done in ten. We conclude that no understanding or agreement between the clerk of this court and appellant's attorney could dispense with a compliance with the provisions of the rule of the court here involved, and that appellant had no right in law to rely upon any such understanding.

While the motion to dismiss the appeal and the printed transcript were filed upon the same day, none of appellant's rights were saved thereby, for by rule V of this court the filing of the transcript can only defeat the motion when it is filed before the notice to dismiss is served, and such was not the fact in this case. (*Carter v. Paige*, 77 Cal. 64; *Chapman v. Bank of California*, 88 Cal. 419.) Again, it is contended that the printed transcript was in the office of Wells, Fargo & Co., in transit to the clerk of this court for filing, when the motion to dismiss was served, and for that reason the motion should be denied. Placing the document in the office of Wells, Fargo & Co. was not the equivalent of filing, and it cannot be considered as filed when so placed. The principle declared in *Hanson v. McCue*, 43 Cal. 178, does not go to such lengths.

It thus appears that appellant has no legal ground upon which to stand in combating this motion of respondent, and, therefore, the only question to be determined is, Are the facts shown in the affidavit on behalf of the appellant sufficient to excuse his failure to file the printed transcript? Upon consideration, we have arrived at the conclusion that they are sufficient. When we consider the understanding had between the clerk of this court and appellant's attorney as to how and when the transcript should be printed, and that the attorney proceeded under such understanding, and had the transcript printed without unnecessary delay, as far as any direct showing to the contrary is concerned; when we consider that the clerk, although without any authority to do so, in effect waived the payment of the funds provided for by the rule, and that the rule has never here-

tofore been construed, and that the construction placed upon it by appellant's attorney is neither arbitrary nor unreasonable, we conclude that to dismiss the appeal would be a hardship upon appellant too heavy to find justification in the foregoing facts.

For the foregoing reasons the motion to dismiss the appeal is denied.

McFARLAND, J., VAN FLEET, J., HARRISON, J., TEMPLE, J., and HENSHAW, J., concurred.

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[No. 15910. Department Two.—December 26, 1895.]

**CHRISTIANA T. RANDOL, APPELLANT, v. EUGENE  
B. SCOTT ET AL., RESPONDENTS.**

**LEASE—ASSIGNMENT—COVENANT BY JOINT LESSEES—INSOLVENCY O.**

**ONE LESSEE—FORFEITURE.**—A covenant by two joint lessees of land not to assign the lease or permit any assignment thereof to be made by bankruptcy or otherwise, without the written consent of the lessor, is not broken, so as to incur a forfeiture of the lease, by an adjudication and assignment in insolvency by one of the lessees of his interest in the lease, to which the other lessee is not a party, and which he could not have prevented.

**ID.—CONSTRUCTION OF COVENANT—CONDITION INVOLVING FORFEITURE.**—

A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created, and to prevent the restraint from going beyond the express stipulation; and a covenant by the lessees not to assign the lease must be presumed to mean that the lease should not be assigned by the joint act of the lessees.

**ID.—CULTIVATION IN HUSBANDLIKE MANNER—BREACH OF COVENANT—**

**WAIVER OF OBJECTION.**—Under a covenant that the land shall be continuously cultivated in a good and husbandlike manner, and kept clear of other growth, except that the lessees may raise squash or pumpkins between the peach trees during the first two years of their growth, the planting of corn, beans, and nursery trees over a very small part of the land is too trivial a matter to warrant a forfeiture of the lease, where the lessor had a right to inspect the premises, and to be informed of the condition of the land and trees and of the performance by the lessees of their covenants, and made no objection to what was done by the lessees.

**APPEAL from a judgment of the Superior Court of Santa Clara County. JOHN RAYMOND, Judge.**

The facts are stated in the opinion of the court.



*Edward J. Pringle*, for Appellant.

A stipulation in a lease for its determination in case the lessee should become bankrupt is valid, and it is neither in opposition to any express law nor unlawful as against reason or public policy. (*Farnum v. Hefner*, 79 Cal. 581; 12 Am. St. Rep. 174; Taylor on Landlord and Tenant, sec. 404; *Davis v. Eyton*, 7 Bing. 154; *Doe v. David*, 5 Tyrw. 125; *Roe v. Galliers*, 2 Term Rep. 133; Platt on Covenants, 421; 1 Washburn on Real Property, 5th ed., 504; *Holland v. Cole*, 1 Hurl. & C. \*67; *King v. Topping*, 1 McClel. & Y. 544; *Yarnold v. Moorhouse*, 1 Russ. & M. 365; *Cooper v. Wyatt*, 5 Madd. 482; *Shree v. Hale*, 13 Ves. 404; *Ex parte Gould*, 13 L. R. Q. B. Div. 455; *Kilkenny Gas Co. v. Summerville*, L. R. 2 Irish, 194; Wood on Landlord and Tenant, 716.) Such a covenant means that neither of the lessees shall assign the whole or any part of his interest without consent. (*Varley v. Coppard*, L. R. 7 Com. P. 505; *Clarke v. Cummings*, 5 Barb. 339; *Copland v. Laporte*, 3 Ad. & E. 517; *Jackson v. Groat*, 7 Cow. 285; *Commonwealth v. Curtis*, 9 Allen, 266; *Commercial Wharf Co. v. Winsor*, 146 Mass. 562.) The covenant for cultivation in a particular manner is valid. (*Doe v. Davis*, *supra*; *Bristol v. Westcott*, L. R. 12 Ch. Div. 461; 1 Pomeroy's Equity Jurisprudence, sec. 454, note 3.)

*W. C. Kennedy*, for Respondent Eugene B. Scott.

*L. Archer* and *Nicholas Bowden*, for Respondents *W. W. Cozzens* and *Frank M. Burkholder*.

A covenant by a lessee against assignment and underletting is not broken by an involuntary transfer of the possession, as if it be sold by a sheriff on execution, or an assignee in bankruptcy, or by an executor. (2 Greenleaf on Evidence, sec. 245, and cases cited in note 6; Woods on Landlord and Tenant, 534-37; Taylor on Landlord and Tenant, sec. 408.) If the insolvency of Cozzens had been involuntary, such insolvency would not work a forfeiture. (*Farnum v. Hefner*, 79 Cal. 575; 12 Am. St. Rep. 174; *Farnum v. Hefner*, 92 Cal. 543; *Pe-*

*mis v. Wilder*, 100 Mass. 446; *Riggs v. Pursell*, 66 N. Y. 198; *Jackson v. Silvernail*, 15 Johns. 278; *Smith v. Putnam*, 3 Pick. 221.) The words "insolvent" and "insolvency" are not synonymous with the words "bankrupt" and "bankruptcy." Insolvency means an inability to pay debts in the ordinary course of business. Bankruptcy means a particular legal status to be ascertained by judicial decree. (Am. & Eng. Ency. of Law, 67; *In re Black*, 2 Ben. (D. C.) 196; *Morse v. Godfrey*, 3 Story, 365; *Ogden v. Saunders*, 12 Wheat. 230; *Williams v. Norris*, 12 Wheat. 122; *Ward v. Crane*, 3 Blackf. 394; *Van Hook v. Whitlock*, 26 Wend. 43; 37 Am. Dec. 246; 1 East, 11; 4 Barn. & Ald. 654; Bald. 296; Am. & Eng. Ency. of Law, 67.) A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created. (Civ. Code, sec. 1442; *Gear's Landlord and Tenant*, sec. 195; *Sauer v. Meyer*, 87 Cal. 34; *Van Buren v. Digges*, 11 How. 477; *Muldoon v. Lynch*, 66 Cal. 539; *Anglea v. Commonwealth*, 10 Gratt. 700; 8 Am. & Eng. Ency. of Law, 443; *Taylor on Landlord and Tenant*, sec. 489; *Wyndham v. Carew*, 2 Q. B. 317; *The "Elevator case,"* 17 Fed. Rep. 200.) The covenant is against public policy, and is construed most strongly against the lessor. (Civ. Code, secs. 1441, 1596, 1667, 3513; *Chipman v. Emeric*, 5 Cal. 49; 63 Am. Dec. 80; *Henderson v. Carbondale etc. Co.*, 140 U. S. 25; Insolvent Act, secs. I, 4, 6, 17, 18, 20; *Ex parte Barter*, L. R. 26 Ch. Div. 510; 12 Am. & Eng. Ency. of Law, 1003; *Greenhood on Public Policy*, 566-68.) The assignment of Cozzens was an act of law, and its effect cannot be defeated by private agreement. (Civ. Code, sec. 3513.) The contract of the lessees is joint, and not several. Their covenant in terms and law is, that no joint assignment shall be made. (Civ. Code, sec. 1431; *Harrison v. McCormick*, 69 Cal. 620; *Northern Ins. Co. v. Potter*, 63 Cal. 157; *Freeman v. Campbell*, 55 Cal. 197.) If the land was not cultivated in the manner provided by the lease, the remedy of the lessor is not forfeiture of the lease, but an action for damages or injunction. (*Taylor's Land-*

lord and Tenant, secs. 420-23; *Drury v. Molins*, 6 Ves. 328; *Pratt v. Britt*, 2 Med. 62; *Hubble v. Cole*, 85 Va. 87.) In order to enforce a power of re-entry for breach of covenant, it must be clear and manifest that it was the intention of the parties to provide for it. (2 Taylor on Landlord and Tenant, sec. 489; *New York Life Ins. etc. Co. v. Rector etc.*, 64 How. Pr. 511; *Price v. Nicholas*, 4 Hughes, 616; *Croft v. Lumley*, 85 Eng. Com. L. R. 648.)

MCFARLAND, J.—A demurrer to the amended complaint was sustained; plaintiff declined to further amend; and judgment was rendered for defendants. Plaintiff appeals from the judgment.

The action is to recover possession of land leased by the plaintiff, upon the ground that certain covenants of the lessees have not been kept—substantially a bill to declare the forfeiture of a lease. The provision for the forfeiture is that “if default shall be made in any of the covenants herein contained, then it shall be lawful for the lessor to re-enter the said premises.”

The term of the lease was ten years from the first day of October, 1890. The lessees were Eugene B. Scott and W. W. Cozzens. The land leased was four hundred and nineteen acres of uncultivated land. By the terms of the lease the lessees were to lay out and divide four hundred acres of this land into eight convenient parts as nearly equal as may be, “having regard to separate facility of access, and subject to the approval of the lessor”; they were to “thoroughly prepare” this four hundred acres for planting, and to plant the whole thereof with trees of French prunes and peaches of certain specified varieties, and to complete the planting in the winter of the year 1890; they were to properly tend, cultivate, prune, and care for these trees during the whole term of the lease, and to protect them from disease and insects by the most improved methods; and they were to gather the fruit (of course, after the trees should have commenced to bear) each year in boxes and deliver one-

third thereof, as rent to plaintiff, at a place in San Jose to be selected by her agent. There are other covenants by the lessees not necessary to be here noticed, because the complaint admits that all the covenants were fully complied with, except the two hereinafter mentioned.

One of the covenants alleged to have been broken is as follows: "And the said lessees do hereby covenant . . . . not to assign this lease, or permit any assignment thereof to be made by bankruptcy or otherwise, without the written consent of the lessor." And the alleged breach of this covenant is based upon the alleged facts that in September, 1891, said Cozzens filed his petition in insolvency in the proper court, and included in the schedule of his property "an undivided one-half interest" in said lease; that he was subsequently adjudged by said court to be an insolvent debtor; that in October, 1891, one Burkholder duly became his assignee; that in due course all of said Cozzens' property was assigned to said assignee; that in March, 1892, said assignee was empowered by said court to sell all the property of said insolvent; that he threatens to sell the same, including the said half-interest in said lease; and that said Scott and said Burkholder are in possession of said demised premises, and withheld the same from plaintiff.

These averments do not show an assignment of *the lease* by the *lessees* within the meaning of said covenant—waiving other points made by respondents in support of the judgment, as, for instance, that under the strict construction applicable to forfeitures "bankruptcy" does not include insolvency; that the assignment to the assignee in insolvency was by operation of law and was not the act of Cozzens; that Scott did not "permit" the bankruptcy; and that the covenant is against public policy and in express contravention of the insolvent law. Scott and Cozzens were tenants in common of the land leased; this is admitted and declared by appellant. Neither could, therefore, dispose of the interest of the other; nor could either prevent the other from disposing

of his interest; and appellant must be considered as having dealt with the lessees as tenants in common, and with knowledge of their rights, powers, and disabilities as such tenants. When, therefore, under these circumstances it was covenanted merely that the "lessees" should not assign "the lease"—*the lease*, as an entirety—the meaning of the parties is presumed to be that the lease should not be assigned in the only way in which it could have been assigned, namely, by the joint act of the lessees. The lease, therefore, was not assigned within the meaning of the contract. If the proceedings in insolvency worked a valid assignment of anything, it was only an interest in the lease; and that Scott could not have prevented. The covenant does not provide that the lease should be forfeited upon the assignment by one of the tenants in common of his interest. The understanding of the parties as to the covenant in question is illustrated by another clause which provides that the lessor may cancel the lease "in case of the death of *the lessees*"—not of one of the lessees. A forfeiture can be enforced only when there is "such a breach shown as it was *the clear and manifest intention* of the parties to provide for. (Taylor on Landlord and Tenant, 8th ed., sec. 489, and cases cited.) In all the cases cited by appellant the covenant was by a single lessee—holding in severalty. In *Varley v. Coppard*, L. R. 7 Com. P. 505, the original lessee had assigned to *copartners*. Of course it is unnecessary to cite authorities to the points that covenants in restraint of alienation are barely tolerated, and that contracts looking to penalties and forfeitures must be strictly construed; but a few instances of particular expressions used in statements of the rule, and cases to which it has been applied, may not be unprofitable. Our own code provides that "a condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created." (Civ. Code, sec. 1442.) As to the power of re-entry for the forfeiture of a lease it was said by Justice Miller: "It has always been considered that it was necessary to restrain it to the *most*

*technical limits* of the terms and conditions upon which the right is to be exercised." (*"Elevator Case,"* 17 Fed. Rep. 201.) "Covenants of this description are construed by courts of law with the utmost jealousy to prevent the restraint from going beyond the express stipulation." (Taylor on Landlord and Tenant, sec. 403.) In *Hasbrook v. Paddock*, 1 Barb. 635, it was held that a lease of a lot of state land (under a statute) which provided for a forfeiture if the lot should be used for purposes other than the manufacture of salt was not forfeited by the use of a *part* of the lot for other purposes; and the court, after referring to the rule of strict construction against penalties and forfeitures, said: "Until the legislature has explicitly declared their intention to forfeit parts of lots, it is no part of the duty of courts, in the construction of a penal statute, to extend the meaning of words and phrases which the lawmakers have chosen to employ." In *Jackson v. Silvernail*, 15 Johns. 278, the covenant of the lessees was not "to sell and dispose of, or assign their estate in the demised premises," and the lessees "demised, leased, and to farm let" a part of the premises for twenty years—being less than the full term; and the court held that this did not give a right of re-entry—saying that "the plaintiff's right is *stricti juris*, and to enable him to recover on the ground of forfeiture he must bring his case within the penalty on the most literal and rigid interpretation of the covenant," and that the covenant meant an assigning of the whole estate, and not a mere subletting. It has been held also that a covenant "not to let or underlet the whole or any part" of the demised premises does not preclude an assignment of the whole interest. (*Lynde v. Hough*, 27 Barb. 415.) These instances (extreme perhaps) are noticed merely to show the tenacity with which courts hold to the rule that forfeitures of estates and restraints upon alienations should not be enforced except when the terms of the conditions are so plain as to be beyond the province of construction. And an application of these principles to the case at bar clearly precludes the forfeiture here at-

tempted. It is difficult to imagine a case where the enforcement of a forfeiture would be more unjust. This action was not commenced until the fourth year after the execution of the lease, and three years after the insolvency of Cozzens; and it is quite apparent that the lessees had then performed the burdensome part of their contract without having received any substantial remuneration. They created a valuable property for appellant, by preparing the soil and planting and taking care of the trees until they were about in a condition to bear fruit and return something to them for their outlay; and now the appellant proposes to take possession of the land thus improved, and appropriate, without consideration, the results of their money and labor.

2. A mere statement of the second ground for a forfeiture is sufficient to show its insufficiency. The covenant, for the violation of which the forfeiture is sought in the second count of the complaint, is as follows: "The land to be continuously cultivated in a good and husbandlike manner, and kept clear of other growth, except that the lessees may raise squash and pumpkins between the peach trees during the first two years of their growth, and between the prune trees during the first three years of their growth"; and the averment upon which forfeiture is sought is that the cultivation was not in a good and husbandlike manner "*in this*, that the defendants have planted, and now maintain, four rows of *corn* between every two rows of the said fruit trees over a space of about twelve acres, and four rows of *beans* between every two rows of the said fruit trees over a space of about twenty acres, and a nursery of young trees between the rows of the fruit trees in the said land described over a space of two acres." Whatever other remedies appellant may have had, the planting of corn, beans, and nursery trees over a very small part of the four hundred acres, instead of squash and pumpkins over the whole of it, is entirely too trivial a matter, under the principles above stated, to warrant a forfeiture—particularly as the lessor had the right, under

the terms of the lease, to "at any and all times enter upon and inspect the demised premises in order to be informed of the condition of the land and trees, and of the faithful performance by the lessees of their covenants aforesaid," and made no objection to the corn and beans.

The judgment is affirmed.

HARRISON, J., and TEMPLE, J., concurred.

Hearing in Bank denied.

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[Crim. No. 40. Department Two.—December 26, 1895.]

**THE PEOPLE, RESPONDENT, v. JOHN SHAUGHNESSY, APPELLANT.**

**CRIMINAL LAW—LARCENY—CONSPIRACY TO DEFRAUD—BUNCO GAME.—**

Where the possession of the money of the prosecuting witness was obtained by a conspiracy on the part of the defendant and the manager of a lottery, to cheat and defraud the prosecuting witness by what is known as the "bunco game," and it appears that the prosecuting witness did not intend to part with his property in the money, and that it was obtained from him by the grossest fraud, the defendant may be prosecuted and convicted of larceny therefor.

**ID.—INSTRUCTIONS—READING OF CODE—FRAUDULENT OBTAINING OF MONEY.**—Instructions of the court must be read together as a whole, and where the court sufficiently instructs the jury as to the evidence required in order to convict the defendant of larceny under section 484 of the Penal Code, the fact that it reads to the jury section 332 of the Penal Code, in regard to the fraudulent obtaining of money by methods which do not necessarily constitute larceny, is not ground for reversal of a judgment of conviction of larceny.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. **EDWARD A. BELCHER**, Judge.

The facts are stated in the opinion.

*A. B. Treadwell*, for Appellant.

*W. F. Fitzgerald*, Attorney General, and *Charles H. Jackson*, Deputy Attorney General, for Respondent.

Section 484 of the Penal Code, defining larceny generally, is broad enough to cover the kinds of larceny



denominated in section 332, and all other forms of larceny. (*People v. Smallman*, 55 Cal. 185; *People v. Rae*, 66 Cal. 425; 56 Am. Rep. 102; *People v. Raschke*, 73 Cal. 381; *Commonwealth v. James*, 1 Pick. 375, 384; 2 Wharton's Criminal Law, 1848; *Defrese v. State*, 3 Heisk. 53; 8 Am. Rep. 5; 2 Russ. 9th Am. ed., 102; *People v. McDonald*, 43 N. Y. 64; *Smith v. People*, 53 N. Y. 113; 13 Am. Rep. 474; 2 Bishop's Criminal Law, sec. 813; *Rex v. Good*, 2 Car. & P. 422; 2 Bishop's Criminal Law, sec. 809; *Loomis v. People*, 67 N. Y. 322; 23 Am. Rep. 123; *Hildebrand v. People*, 56 N. Y. 395; 15 Am. Rep. 435; *Welsh v. People*, 17 Ill. 339; *Huber v. State*, 57 Ind. 341; 26 Am. Rep. 57; *People v. Abbott*, 53 Cal. 284; 31 Am. Rep. 59; *Commonwealth v. Barry*, 124 Mass. 325; *Queen v. Russett*, L. R. 2 Q. B. Div. 312.)

SEARLS, C.—An information was lodged against John Shaughnessy, the defendant and appellant here, by the district attorney of the city and county of San Francisco, charging him with the crime of grand larceny, alleged to have been committed at said city and county on the first day of September, 1894, by the felonious stealing, taking, and carrying away two thousand and eighty dollars, etc., the personal property of one Charles Anderson.

He was arraigned, tried, convicted, and sentenced to serve a term of four years in the state prison at Folsom, California.

From this judgment and from an order denying his motion for a new trial the defendant prosecutes this appeal. A general outline of the case as made by the prosecuting witness, Charles R. Anderson, may be stated thus: In July, 1894, said Anderson made the acquaintance of the defendant Shaughnessy, who professed to be familiar with games and gaming, and who was without money, while Anderson had, or professed to have, some four thousand dollars. The prosecuting witness had a wheel of fortune manufactured, and there were negotiations between the parties looking to a trip to South

America for gambling purposes, Anderson to furnish the capital and defendant the skill, the profits to be divided.

About the last of August a third man, a stranger named Sampson, appeared on the scene, made the acquaintance of the parties, and professed to come from South Africa, where he had made money. Defendant professed to have seen Sampson's funds, and to know that he had large means. Thereupon the three agreed to form a copartnership, go to South Africa, open a saloon, and engage in gambling.

An agreement was prepared, and on September 1st the parties started down town to execute this agreement. On Grant avenue they stopped at a saloon, at the request of Sampson, to take a drink, where said Sampson was informed he had drawn a prize in a lottery.

The parties then went to the lottery office, Anderson objecting, but is induced by the others to go up stairs, and to the room where the lottery is carried on. They there find a man in charge, who informs Sampson he has drawn one hundred and twelve dollars, of which sum he pays him one hundred and ten dollars, and, after some discussion, gives him lottery tickets for the two dollars, with which he draws a prize of some twenty dollars; receives more tickets, which he divides with Anderson, and they proceed to another drawing; whereupon Anderson is informed he has drawn an *approximate prize* of five hundred dollars, but that, to make it absolute, some five other drawings were necessary, and, in the mean time, and as the drawings progressed, the lottery company had a right to demand that certain assessments be put up as evidence of good faith; all of which assessments were to be returned to the player at the end of the drawings, together with the prizes won, if any.

Special drawings were then had, during which the banker called upon Anderson for deposits. He seems to have been in doubt; but, upon being assured by defendant and Sampson that they understood the game,

and that it was "square and fair," and, upon being assured by defendant that "it is all right; you won that five hundred dollars, and you better stick to it," again he was assured that the money he put up was to be returned in any event, and "that he need not have any fears on that score," etc., whereupon, after going out repeatedly for more money, he placed in all upon the table some two thousand and eighty dollars, only to be told that at the sixth and last drawing, with but a single chance against him, he had lost.

The lottery man refused to return his money, and, upon his attempt to regain it, he was seized by defendant and Sampson, and held, while the banker secured it, they giving as a reason for so doing that they had seen one man killed in such an attempt, and did not wish to witness another such tragedy. We have not attempted a description of the *modus operandi* of the game, but refer to the description as given by an expert in *People v. Rose*, 85 Cal. 378, as conveying a fairly accurate delineation of the method pursued in the case at bar.

We need not pursue the subject by showing the devices used by defendant and Sampson to prevent Anderson from calling in the police, and to lull him into silence until Sampson and the so-called banker left the city.

It is sufficient to say there was evidence sufficient, if credited by the jury, to show a conspiracy, on the part of the defendant, Sampson, and the manager of the lottery, to cheat and defraud the prosecuting witness of his money by what is familiarly known as the bunco game.

The contention of counsel for appellant is that defendant is informed against for larceny under section 484 of the Penal Code, and that the evidence, if it shows the defendant to be guilty of any crime (which is not admitted), proves it to be that of fraudulently obtaining money by device, trick, etc., by the use of cards as defined by section 332 of the Penal Code, and while it is

"punished as in case of larceny of property of like value," is not made larceny by the code, and that a conviction of larceny cannot be had for a violation of said section.

The question is not whether defendant could have been indicted or informed against under section 332, and convicted upon the evidence presented, but whether under an information charging grand larceny in the usual form he was properly convicted.

There is a class of cases in which a party may properly be charged and convicted of either larceny, or under section 332 of the Penal Code. (*People v. Frigerio*, 107 Cal. 152, 153.)

As was said by the court in *People v. Tomlinson*, 102 Cal. 23: "Where one honestly receives the possession of goods upon a trust, and, after receiving them fraudulently, converts them to his own use, it is a case of embezzlement.

"If the possession has been obtained by fraud, trick, or device, and the owner of it intends to part with his title when he gives up the possession, the offense, if any, is obtaining money by false pretenses.

"But where the possession has been obtained through a trick or device, with the intent, at the time the party receives it, to convert the same to his own use, and the owner of the property parts merely with the possession, and not with the title, the offense is larceny." (Citing *People v. Raschke*, 73 Cal. 378; *People v. Johnson*, 91 Cal. 265; *People v. Laurence*, 137 N. Y. 517; *Commonwealth v. Lannan*, 153 Mass. 287; 25 Am. St. Rep. 629.)

This rule in reference to larceny prevails alike in England and the United States. In *The Queen v. Russett*, L. R. 2 Q. B. Div. 312, decided in 1892, Coleridge, C. J., said: "If the possession of the money or goods said to have been stolen has been parted with, but the owner did not intend to part with the property in them, so that that part of the transaction is incomplete, and the parting with the possession has been obtained by fraud, this is larceny." *People v. Smallman*, 55 Cal. 185, and *Peo-*

*ple v. Rae*, 66 Cal. 425, 56 Am. Rep. 102, are to like effect. The evidence in the case at bar fully sustains the position that the prosecuting witness did not intend to part with his property in the money, and that it was obtained by the rankest kind of fraud.

We repeat the testimony of Anderson: "All the money we would be called upon to put up during these drawings, at the end of the drawing, would be returned to us in full, in addition to any prizes we might win in the mean time, would be paid over to us, but if we failed to put up the money that the lottery company called for, that the company would not be called upon to pay, as that was all the percentage he had." At the end of the game the witness says: "I saw that I was swindled, and jumped up and tried to grab for my money. Shaughnessy (defendant) and Sampson grabbed me by the arms and pulled me back from the table, while the lottery man pocketed the coin."

This testimony is without conflict, except that defendant testified that his motive was to prevent a difficulty. Counsel also assigns as error the reading by the court below to the jury of section 332 of the Penal Code. The court stated to the jury as follows:

"The contention on the part of the people, as I understand it, is that this money, if taken at all from the prosecuting witness, was taken by fraud, trick, and device. The provision of our statute is as follows. [The court then quoted section 332 of the Penal Code.] Had it stopped here it would have been error, for the reason that the fraudulent obtaining of money by the methods specified in that section is not necessarily larceny, but we must read the instructions of the court together and as a whole, and the court further instructed as follows:

"The law is that when, by means of fraud or artifice, or any other kind of contrivance, the possession of property is fraudulently obtained from another, and the party obtaining this possession acquires it by means of this fraud and artifice, with the intention feloniously of stealing it when he gets possession of it, then the crime

is larceny, provided the owner of the property, who has thus deposited and loses its possession, still remains the owner of the property and has not parted with his title. One of the questions, therefore, for the jury to consider in this case is, whether there was a parting of the title on the part of the prosecuting witness. To state the rule again: If the possession of the money or goods said to have been stolen has been parted with, but the owner did not intend to part with the property in them, so that that part of the transaction is incomplete, and the parting with the possession has been obtained by fraud, that is larceny.

"Gentlemen of the jury: I again inform you that you are the exclusive judges of the facts, of what has been proven in the case, and of the credibility of the witnesses. It is for you to say: 1. Whether an offense has been committed; and 2. Whether the defendant had any part in the commission of it."

When thus taken together, and in connection with the other instructions given in the case, the law was properly interpreted by the court.

The instruction of the court upon the question of a reasonable doubt and a moral certainty are not open to just criticism.

Upon the whole record the defendant appears to have been fairly tried and properly convicted, and the judgment and orders appealed from should be affirmed.

VANCLIEF, C., and HAYNES, C., concurred.

For the reasons given in the foregoing opinion the judgment and orders appealed from should be affirmed.

McFARLAND, J., HENSHAW, J., TEMPLE, J.

[S. F. No. 146. Department Two.—December 27, 1895.]

**IN THE MATTER OF THE ESTATE OF HENRY WELCH,  
DECEASED. JOHN PURCELL, APPELLANT, v. MARY  
C. YOUNG ET AL., RESPONDENTS.**

**ESTATES OF DECEASED PERSONS—PETITION TO REMOVE ADMINISTRATOR—EVIDENCE—DECLARATIONS OF DECEASED.**—Under a petition to remove an administrator upon the ground that the deceased had, at the time of his death, a large sum of money, which came into the possession of the administrator, or of which he had knowledge, which he failed to include in his inventory, evidence of declarations made by the deceased in respect to the value of his estate, and that he had a large sum of money in his house, is not admissible against the administrator, to prove the ownership or possession of the money.

**ID.—INTEREST IN PARTNERSHIP—TRANSFER BY DECEDENT—REMOVAL OF ADMINISTRATOR.**—Where the only evidence tending to show that the decedent owned an interest in a partnership with the administrator was the fact that, a few days before his death, he assigned his interest in it to his wife, and there are no grounds for attacking the transfer, the administrator cannot be removed for failing to show the partnership interest of the deceased in the inventory.

**ID.—IMPROPER PAYMENT OF ATTORNEY'S FEE.**—The fact that the administrator improperly paid an attorney's fee is no ground for his removal.

**ID.—CUSTODY OF ASSETS BY ADMINISTRATOR—POWER OF COURT—BOND OF ADMINISTRATOR.**—An administrator cannot be deprived of the actual custody of the assets of the estate by an order of the probate court directing him where and how he shall keep them; but the administrator is liable for their safety on his bond, and the court cannot lawfully take charge of the assets or deprive interested parties of the security of the bond.

**APPEAL** from an order of the Superior Court of the City and County of San Francisco removing John Purcell from the position of administrator of the estate of Henry Welch, deceased. J. V. COFFEY, Judge.

The administrator, John Purcell, was charged with retaining twelve hundred dollars from the sale of a one-half interest in a threshing machine, belonging to Henry Welch, for which he failed to account. He denied that he collected or received any money on account of Henry Welch from the sale of any interest in a threshing machine, and claimed that he had paid money to the deceased for safe-keeping, for which he presented a claim

against the estate to the amount of upwards of five thousand dollars.

The further facts are stated in the opinion of the court.

*John T. Greany*, for Appellant.

The declarations said to have been made by Welch, not in the presence or hearing of appellant, and the declarations made by the widow and Michael Purcell, which were not shown to have been made in his presence, or with his knowledge or consent, were hearsay. (*People v. Irwin*, 77 Cal. 494.)

*Chas. A. Sumner*, and *M. T. Moses*, for Respondents.

The declarations of one deceased, claiming property as his own, at a time when he was in possession and control of it, are admissible to prove his ownership. (*McConnell v. Hannah*, 96 Ind. 102; *Headen v. Womack*, 88 N. C. 468; *Whitwell v. Winslow*, 132 Mass. 307; *Davis v. Drew*, 58 Cal. 152; *Abend v. Mueller*, 11 Ill. App. 257; *Bennett v. Camp*, 54 Vt. 36; *Swettenham v. Leary*, 18 Hun, 284; *Mayes v. Power*, 79 Ga. 631; *Carney v. Carney*, 95 Mo. 353; *Tait v. Hall*, 71 Cal. 152; *Lamoreux v. Huntley*, 68 Wis. 24.) While mere hearsay or declarations are not admissible as evidence to prove facts, yet when there is a claim and assertion of ownership, which can only be proved by acts and words of the claimant, such acts and accompanying words stand on the same footing, and are admissible for this purpose. (*Phipps v. Pierce*, 94 N. C. 514.) The statements that Welch owned the interest in the partnership are so connected with the transactions between the alleged partners as to be a part of the *res gestae*, and are therefore clearly admissible. (*Hilton v. McDowell*, 87 N. C. 364.)

TEMPLE, J.—This is the second appeal in this matter. (*In re Welch*, 86 Cal. 179.)

After the *remittitur* was filed, the petition for the removal of the administrator was amended, and the mat-



ter retried. The court found as before, and also three additional facts, and again removed the administrator. The order is expressly based solely upon the new facts found on the retrial. They are: 1. That deceased had, at the time of his death, ten or twenty thousand dollars in money, which came into the possession of the administrator, or of which he had knowledge. That he failed to include it in his inventory, or to inform the court thereof; 2. That said Purcell collected for Henry Welch, before Welch's death, some twelve hundred dollars, which he has not accounted for or charged himself with; and 3. That Welch was a partner in the firm of "McKenna and Purcell," his interest standing in the name of said Purcell, who was only nominally a partner, and that he has not shown that interest in the inventory, or given any information in regard thereto to the court.

In regard to the first finding, which, no doubt, is most relied upon, if the evidence produced were competent, it does raise a grave suspicion that some assets were concealed, either by the widow or her brother, who is the administrator, or both.

It is not necessary to discuss the question as to whether this finding was supported by the evidence. Errors were committed on the trial in the admission of testimony which will necessitate a new trial.

The evidence was almost all hearsay, consisting largely of declarations made by the deceased to the effect that his estate was of the value of fifty, sixty, or seventy thousand dollars, and that he had a large sum of money in his house. This testimony was not admissible against appellant. There is no analogy between such statements and declarations made by a person in possession of property characterizing his possession. In the last case, the claim made by the possessor is of itself a material matter. Or, in the instances where it is not so, the declarations are against interest.

Such was not the case here. The declarations were material only as showing the fact asserted, to wit, the

ownership and possession of property, the very existence of which was sought to be proven by the declarations.

The conversation between Mrs. Welch, Michael Purcell, a brother of appellant, and a witness for petitioner, was irrelevant.

I do not think the evidence sustains the second finding. It seems to show that Purcell did not own the machine, but it also shows that he paid the money to Welch. We may be at liberty to believe that Purcell testified falsely when he said he gave the money to Welch for safe-keeping; perhaps also to suspect that the claim he presented against the estate was simulated.

He sold the machine two years and a half before Welch died, and as he gave the money to Welch, the presumption would be if Welch owned the machine it was a payment. As to the third finding, the only real evidence tending to show that Welch owned the interest in the partnership was the fact that, a few days before his death, he assigned his interest in it to Mrs. Welch in the presence of John Purcell. There may be grounds for attacking this transfer, but none are shown. Under such circumstances it would not justify the removal of appellant.

If the other matters found were immaterial to the issue they should not have been found. The fact that appellant paid an attorney's fee improperly would constitute no ground for his removal.

I know of no law which authorizes a probate judge to direct an administrator where and how he shall keep the assets of an estate, and surely there ought to be no such law. The administrator is liable for their safety on his bond. If the court could lawfully take charge of them it would deprive interested parties of this security. If goods are lost it may be a question whether they have been properly cared for. If they have been placed where the judge has directed, and then lost, he will have prejudged the case before the trial.

Administrators cannot be deprived of the actual custody of the assets of the estate by such an order.

The order is reversed and a new trial ordered.

McFARLAND, J., and HENSHAW, J., concurred.

Hearing in Bank denied.

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[Crim. No. 21. In Bank.—December 27, 1895.]

**THE PEOPLE, RESPONDENT, v. PAULO KAMAUNU,  
APPELLANT.**

**CRIMINAL LAW—VOLUNTARY CONFESSION—PRELIMINARY PROOF.—**

Where a witness testifies to a confession made by the defendant under circumstances which show that it was impossible that there could have been an inducement offered by the witness to the defendant to make the confession, and the evidence further shows a motive of the defendant to make it, which was suggested by no one, and that his purpose was to enforce silence by a threat which immediately followed the confession, the failure of the court to institute a preliminary inquiry to determine whether the confession was voluntary before admitting it in evidence, is not prejudicial.

**ID.—MURDER IN THE FIRST DEGREE—PUNISHMENT—DISCRETION OF JURY—INSTRUCTION.**—Discretion is given to the jury in regard to the punishment in case they find a defendant guilty of murder in the first degree; and the court cannot direct or advise them upon the subject further than to inform them of their province; and it is not error to refuse to instruct them as to how they should use the discretion given them.

**ID.—IMPROPER LANGUAGE OF DISTRICT ATTORNEY—INSTRUCTION OF COURT.**—Where the district attorney makes improper reference to evidence offered and ruled out, if the court immediately instructs the jury that they have nothing to do with such evidence, and that the case must be determined entirely from the testimony received without reference to other things they may have heard, the improper remark of the district attorney, though deserving a rebuke from the court, is not ground for a reversal of the judgment of conviction.

**ID.—PROOF OF VENUE—RESIDENCE OF DECEASED.**—Where it is testified that the deceased resided in the county, and it is plainly implied that she resided at the house in front of which her body was found, and into which it was carried, the venue is sufficiently proved.

**INSTRUCTIONS—EVIDENCE STRICKEN OUT—DUTY OF DEFENDANT.**—If the defendant desires specific instructions as to the effect of evidence stricken out, he should ask for them.

**APPEAL** from a judgment of the Superior Court of El Dorado County and from an order denying a new trial. M. P. BENNETT, Judge.

The facts are stated in the opinion of the court.

*Charles A. Swisler, and Abe Darlington, for Appellant.*

That the matter, testified to by the witness Liloï, was a confession is beyond question. A confession in criminal law is the voluntary declaration made by a person who has committed a crime or misdemeanor, to another, of the agency or participation he had in the same. (*People v. Strong*, 30 Cal. 157; *Bouvier's Dictionary* "Confessions.") Evidence of a confession is admissible only after proof that it was made voluntarily. (*People v. Le Roy*, 65 Cal. 614; *People v. Parton*, 49 Cal. 632, 637; 1 *Greenleaf on Evidence*, 219; *People v. Goldenson*, 76 Cal. 328.) The following language used by the district attorney, was improper and prejudicial to the defendant: "There can be no reasonable doubt of the defendant's guilt, with all the evidence that has been introduced, and all that has been excluded." *People v. Ah Len*, 92 Cal. 282; 27 *Am. St. Rep.* 103; *People v. Bowers*, 79 Cal. 415; *People v. Devine*, 95 Cal. 227; *People v. Wells*, 100 Cal. 459.) The lower court erred in permitting witness Davey to testify as to the conversation or statements made by the prisoners, Liloï and Kamaunu, or either of them, in the jail on July 2, 1894. The statements were merely an accusation made by one against the other, and were, under the circumstances, incompetent. (*State v. Carson*, 36 S. C. 524.)

*W. F. Fitzgerald, Attorney General, and Charles H. Jackson, Deputy Attorney General, for Respondent.*

The circumstances surrounding the confession of the defendant do not necessitate the usual broad foundation as to voluntary characteristics, threats, etc. This matter rests wholly in the discretion of the trial judge upon all the circumstances of the case. (1 *Greenleaf on Evidence*, secs. 215, 219.) Erroneous statement of testimony to a jury by counsel will not give a new trial. (*People v. Lee Ah Yute*, 60 Cal. 95.) There was no reversible error in the conduct of the district attor-

ney. (*People v. Barnhart*, 59 Cal. 402; *People v. Mitchell*, 62 Cal. 411; *People v. Ah Fook*, 64 Cal. 383; *People v. Wheeler*, 65 Cal. 77; *People v. Hamberg*, 84 Cal. 473; *People v. Ross*, 85 Cal. 384.) The venue does not have to be laid in so many words or according to a particular form. So long as jurisdictional facts are shown the law governing venue is satisfied. (*People v. Manning*, 48 Cal. 335; *Bland v. People*, 4 Ill. 364; *Beavers v. State*, 58 Ind. 530; *Commonwealth v. Costley*, 118 Mass. 3; *People v. McGregor*, 88 Cal. 143; *People v. Tonielli*, 81 Cal. 275; *People v. Leong Sing*, 77 Cal. 118; *People v. Marks*, 72 Cal. 46; *State v. Burns*, 48 Mo. 438; 1 Wharton's Criminal Law, sec. 601.) The court takes judicial knowledge of places for the purpose of proving venue. (*Brady v. Page*, 50 Cal. 52; *Whiting v. Quackenbush*, 54 Cal. 306; *State v. Ruth*, 14 Mo. App. 226.) Anything so connected with the crime in point of time and character as to explain how and why it was committed is a part of the *res gestae*. (*People v. Irwin*, 77 Cal. 495; *People v. Nelson*, 85 Cal. 421; *People v. O'Brien*, 78 Cal. 41; *People v. Lee Ah Chuck*, 66 Cal. 666.)

TEMPLE, J.—The defendant was convicted of the crime of murder in the first degree, and sentenced to be hanged. He was charged jointly with one Liloï. During the trial the charge against Liloï was dismissed under section 1099 of the Penal Code, and Liloï was called as a witness against Kamaunu. Witness and Kamaunu were natives of the Sandwich Islands, and spoke English very imperfectly. They had been employed in cutting wood, and lived together. They had finished their contract and had just been paid off. There was evidence tending to show that one of them, on the day before the homicide, had purchased a chicken from the deceased. She was an old lady who lived by herself. On the morning after the purchase of the chicken she was found at her gate dead, and some circumstances pointed to defendant and Liloï as the murderers. When sworn, Liloï state that Kamaunu had purchased the chicken

from deceased, and told him that he believed she had money in the house, because she promptly produced change for a gold coin with which he paid for the chicken. He stated that during the day they drank wine together, and that at night defendant was absent from their cabin and witness went to bed. That during the night he heard knocking and opened the door, when Kamaunu entered. It was between 11 and 12 o'clock. Witness asked: "Where have you been?" Here defendant's counsel objected to evidence of confession, because the proper foundation had not been laid. The objection was overruled and exception taken. The witness proceeded: "Him, he say he been take a walk that night, that is what he say. After that he talka with me he been down that old woman's, he kill that old woman, he lose pistol—revolver, that is what he say, he talka lose revolver very bad." This is the substance of the confession, although, on being questioned, some further remarks to the same effect were elicited.

This was a confession, and the rule is as contended for by counsel for the defense, that the court ought, on a preliminary inquiry, first to determine whether the confession was voluntary. But if the circumstances already show that it must have been voluntary, there would be no necessity for further inquiry. And if it be admitted that there was error, the question then would be, Did the error affect the substantial rights of the defendant? If we cannot determine whether there was injury or not, then, since the defendant has not been tried as the law of the land directs, we must presume injury. For to be so tried is his right. But if we can see that he has not been injured, the judgment will be allowed to stand.

It is apparent from the testimony—if true—that Lilo did not know of the homicide until Kamaunu informed him of the fact in the confession. It was impossible, therefore, that there should have been an inducement offered by Lilo to make the confession. And the testimony further shows a motive which moved defendant

to make the confession, and that the motive was suggested by no one. He knew that when Liloï would hear of the tragedy he would at once suspect him. His purpose was to enforce silence by a threat, which immediately followed the confession. But what inducement could Liloï have offered, even if he had known? How could he make it better for him to confess, or worse for him if he did not? There was no threat except from defendant toward Liloï. It is difficult to see how such a person as the witness could have induced a confession otherwise than by threats. I think we can see that defendant was not injured by the ruling, conceding it to have been erroneous.

There was no error in refusing to instruct the jury as to how they should use the discretion given them in regard to the punishment in case they found the defendant guilty. This discretion is given to the jury, and the court cannot direct or advise them upon the subject further than to inform them of their function.

The district attorney deserved severe rebuke from the court for the remark set out in the bill of exceptions. He stated no fact, however, not already known to the jury. It was merely a reference to evidence offered and ruled out. The court immediately instructed the jury that they had nothing to do with such evidence, and, again, in its general instructions, stated that the case must be determined entirely from the testimony received without reference to other things they may have heard.

The venue was sufficiently proven. It was testified that she resided in the county and that the body was found at the gate. The body was carried into the house. The condition of the house, of the bed, and the doors are shown. The witnesses do not expressly state that this house was her residence, but that it was both the house where she resided and where she was killed is plainly implied.

The rulings in regard to the introduction of testimony seem to be as to unimportant matters or were evidently correct. A particular discussion of them would be of

no moment. There was no doubt as to the admissibility of the conversation in the jail at the time, although it does not seem to possess much importance. Besides, the statements of Liloï were afterward, by the judge, stricken out when the charge was dismissed against him. If defendant desired more explicit instructions upon that subject he should have asked for them.

The judgment and order are affirmed.

McFARLAND, J., VAN FLEET, J., GAROUTTE, J., HARRISON, J., HENSHAW, J., and BEATTY, C. J., concurred.

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[No. 15984. Department One.—December 30, 1895.]

**HANNAH BUTLER, APPELLANT AND RESPONDENT, v.  
THOMAS ASHWORTH ET AL., APPELLANTS AND  
RESPONDENTS.**

**TORTS—DAMAGE BY BROKEN SEWER—SATISFACTION OF JUDGMENT AGAINST CITY—EXTINGUISHMENT OF JUDGMENT AGAINST SUPERINTENDENT OF STREETS.**—Where judgment was obtained against the city and county of San Francisco, in an action to recover for damages caused by a broken sewer, owing to the negligence of the city properly to repair the same, and subsequent to the recovery of such judgment, and before satisfaction thereof, another judgment was obtained against the superintendent of streets and his deputies, for the same injury, upon a complaint charging them with the making of repairs in such a negligent manner as directly to conduce to the injury complained of, after which there was a satisfaction of the judgment against the city, the judgment against the superintendent of streets and his deputies is thereby extinguished, excepting as to the costs of action, and the defendants in that action are entitled to an order restraining and enjoining the plaintiff from issuing or enforcing execution thereunder, and that the judgment against them be ordered satisfied of record.

**ID.—JOINT TORT-FEASORS—ONLY ONE SATISFACTION ALLOWABLE.**—There can be but one satisfaction accorded for the same wrong; and if several persons are guilty in common of a tort, though the injured one may at his election sue them individually or together, he cannot, by suing each wrongdoer alone, secure more than one compensation for the same injury; and if he sue one alone, and is paid damages for the wrong, his remedy is at an end, and he is barred from further recovery against the others.

**ID.—NATURE OF ACTS CAUSING SINGLE INJURY.**—Where the injury caused is single, it is immaterial whether it was caused by the



joint or several acts of the tort-feasor, and the plaintiff can be but once compensated for the injury suffered.

**Id.—CONTRIBUTION TO INJURY—SEVERAL ACTS OF TORT-FEASORS—COSTS OF SEPARATE SUIT.**—Where several acts of tort-feasors contribute to the same injury, there can be but one satisfaction in damages therefor; yet if the acts are not joint, in such a sense as will make the doers of them liable to be sued in a common action as joint tort-feasors, the case is not within section 1023 of the Code of Civil Procedure, which prevents the recovery of costs in more than one action where the defendants sued separately might have been joined as defendants in the same action; and in such case, where the judgment and costs against one of the wrongdoers has been paid and satisfied, though the judgment for damages against the other wrongdoers is also satisfied and extinguished thereby, yet the plaintiff is entitled to recover the costs of a separate action against the other wrongdoers.

**CROSS-APPEALS** from an order of the Superior Court of the City and County of San Francisco declaring satisfied and extinguished a judgment for damages and interest thereon, and restraining execution upon said judgment, and denying a motion for an order declaring the judgment satisfied and extinguished as to the costs of the action in favor of the plaintiff and against the defendant. **CHARLES W. SLACK, Judge.**

The facts are stated in the opinion of the court.

*George B. Merrill*, for Plaintiff and Appellant.

To enable a plaintiff to join several tort-feasors in one action there must be some community in the wrongdoing among the parties so united. (*Sellick v. Hall*, 47 Conn. 260; *Long v. Swindell*, 77 N. C. 183; *Cooper v. Blair*, 14 Or. 255; *Pomeroy on Remedies*, sec. 308; *Trowbridge v. Forepaugh*, 14 Minn. 133.) Against separate tort-feasors separate judgments and satisfactions can be obtained. (*Lull v. Fox etc. Imp. Co.*, 19 Wis. 100; *Chipman v. Palmer*, 77 N. Y. 51; 33 Am. Rep. 566; *Bard v. Yohn*, 26 Pa. St. 482; *Little Schuylkill etc. Co. v. Richards*, 57 Pa. St. 142; 98 Am. Dec. 290; 1 Sutherland on Damages, secs. 141, 142; *Hillman v. Newington*, 57 Cal. 56; *Keyes v. Little York etc. Co.*, 53 Cal. 724.) These defendants were not bound by the judgment against the city, and one who is not bound by a judgment cannot take

advantage of it as an estoppel or satisfaction. (*Lansing v. Montgomery*, 2 Johns. 382; *Deery v. Cray*, 5 Wall. 795; *Nutwell v. Tongue*, 22 Md. 419; *Griffin v. Richardson*, 11 Ired. 439; *Water's Appeal*, 35 Pa. St. 523; 78 Am. Dec. 354; *Yorks v. Steele*, 50 Barb. 397; *Troy v. Smith*, 33 Ala. 469; *Cameron v. Cameron*, 15 Wis. 1; 83 Am. Dec. 652; *Chase v. Swain*, 9 Cal. 136; *Massure v. Noble*, 11 Ill. 531; *Murray v. Sells*, 53 Ga. 257; *Sunderlin v. Struthers*, 47 Pa. St. 411; *Burton v. Hazzard*, 4 Harr. 100; *Myers v. Johnson County*, 14 Iowa, 47.) Enforcing satisfaction of his damages by the collection of one judgment will not preclude the plaintiff from collecting his costs in other judgments. He is entitled to take out execution for their collection. (*Windham v. Wither*, Strange, 515; *Livingston v. Bishop*, 1 Johns. 290; 3 Am. Dec. 330; *Knickerbacker v. Colver*, 8 Cow. 111; *First Nat. Bank v. Indianapolis Piano etc. Co.*, 45 Ind. 5; *Ayer v. Ashmead*, 31 Conn. 447; 83 Am. Dec. 154; *Lord v. Tiffany*, 98 N. Y. 412; 50 Am. Rep. 689.)

*Humphreys & Welch, John T. Humphreys, J. T. Tevlin, W. C. Burnett, and L. G. Burnett, for Defendants and Appellants.*

A person cannot convert a joint into a several trespass, or recover more than one satisfaction for his damages, when it appears that he has suffered the consequences of a single act only. (*Urton v. Price*, 57 Cal. 270; *Tompkins v. Clay Street R. R. Co.*, 66 Cal. 163; *Dawson v. Schloss*, 93 Cal. 194-98; *Wehle v. Butler*, 12 Abb. Pr., N. S., 139; *Stone v. Dickinson*, 5 Allen, 29; 81 Am. Dec. 727; 1 Sutherland on Damages, 214; Cooley on Torts, 139.) Plaintiff collected, accepted, and had satisfaction of the whole judgment against the city and county of San Francisco, and is concluded by the receipt of the amount so paid in full; and her entire claim for damages is thereby extinguished. (Wells on Res Adjudicata and Stare Decisis, secs. 47-50; *Urton v. Price*, *supra*; *United Society of Shakers v. Underwood*, 11 Bush, 265, 272; 21 Am. Rep. 214 (1875); *Tompkins v. Clay Street*

*R. R. Co., supra; Dakota Co. v. Glidden*, 113 U. S. 222, and cases there cited; Wells on Res Adjudicata and Stare Decisis, secs. 47-50; *Sheldon v. Kibbe*, 3 Conn. 214, 221; 8 Am. Dec. 176; Civ. Code, 1281-83, 3333; *Lovejoy v. Murray*, 3 Wall. 1, 10; Herman on Estoppel and Res Adjudicata, 288.) Plaintiff, having collected her costs in the suit against the city and county, ought not to recover them in this action. (Code Civ. Proc., sec. 1023.)

VAN FLEET, J.—Plaintiff brought an action against the city and county of San Francisco alone, to recover damages to her property caused by a broken sewer. The complaint was in two counts, the first upon the breaking of the sewer and the neglect to repair the same, and the second upon the negligent and improper manner in which the break was repaired—the proximate and efficient cause of damage assigned in each count being the inundation of plaintiff's premises by the overflow from the broken and choked-up sewer; and the damages alleged in each count being identical as to time, manner, and extent.

In that action plaintiff recovered a judgment for eleven hundred and ninety dollars and her costs of suit.

Within two years after the bringing of that action, and before the satisfaction of the judgment therein, plaintiff brought the present action against the defendant Ashworth, as superintendent of streets of said city, and the other defendants as his deputies, wherein, in a single count exactly similar in all substantial respects to the second count in the first-named action, she sought damages accruing to her property through the breaking of said sewer, the immediate cause of damage assigned being the same overflow as that alleged in the previous action, and the damages alleged being as to time, manner of infliction, and in amount the same. In this action plaintiff also recovered a judgment for the sum of eight hundred dollars damages, and three hundred and ninety-four dollars costs of action.

Subsequent to the recovery of this last judgment, on

the first day of August, 1893, the judgment in the said action against the city and county was fully paid, satisfied, and discharged. Thereafter, the defendants in the present action moved the court below for an order restraining and enjoining the plaintiff therein from issuing or levying execution under the judgment therein, and that said judgment be ordered satisfied of record, upon the ground that plaintiff by the payment and satisfaction of the judgment in her said action against the city and county of San Francisco had been fully compensated for the identical injuries herein counted upon, and was entitled to no further relief in the premises; that both of said actions were brought for the same cause of action, and against several parties who might have been joined as defendants in one action, and who were all openly within the state at the time of the commencement of the first-named action. At the hearing of this motion the facts substantially as above recited were made to appear, and the court made an order granting the motion as to the eight hundred dollars damages recovered, but denied it as to the sum of three hundred and ninety-four dollars costs. Both parties excepted to the order of the court, and they both appeal—the plaintiff from so much of the order as deprives her of the eight hundred dollars damages, and the defendants from that part denying their right to satisfaction of the judgment as to the costs.

It is a just and well-established doctrine that there shall be but one satisfaction accorded for the same wrong. If one be injured by a tortious act, he is entitled to compensation for the injury suffered, and, if several persons are guilty in common of the tort, the injured one has his right of action for damages against each and all of the joint tort-feasors, and may at his election sue them individually or together. But when the injury arises from a single act, he cannot, by suing each wrongdoer alone, convert a joint into a several trespass, and thereby secure more than one compensation for the same injury. If he sue one alone, and is

paid damages for the wrong, his remedy is at an end, and he is barred from further recovery against the others. (1 Sutherland on Damages, 214; *Stone v. Dickinson*, 5 Allen, 29; 81 Am. Dec. 727; *Urton v. Price*, 57 Cal. 270; *Tompkins v. Clay Street R. R. Co.*, 66 Cal. 163.)

But the plaintiff in support of her appeal claims that this wholesome rule has no application to this case, for the reason, as she contends, that the cause of action stated in her suit against the city and that stated against these defendants are not the same, and that the defendants in the two actions are in no sense joint tort-feasors. That the act relied upon as producing the injury in the action against the city was the delay in making repairs to the sewer, a mere omission, while these defendants are charged with an act of commission, the making of repairs in such a negligent manner as to directly conduce to the injury complained of. While the second cause of action stated in the complaint against the city was the same as that relied upon in this case, it is claimed that the record shows that no issue was joined thereon, and that it was solely upon the first count that plaintiff recovered in that action. Assuming this last fact to be true, which the record, however, fails to show, it is nevertheless perfectly apparent that plaintiff's contention is more specious than sound, and that there exists in fact no real difference between the causes of action stated in the two actions. Formal differences there may be, but in matters of substance there are none. In both actions the inducing, proximate cause of damage and injury alleged is the invasion of her premises by the overflowing sewage, caused by the broken and choked condition of the sewer. That is the essential fact alleged alike in both counts of her action against the city, and in the complaint in this case. That is the fact constituting the *gist* of the action in both cases, and, as we have seen, it was one and the same overflow—in other words, the same fact which produced the alleged damage in both cases. The mere fact that the sewer broke produced no injury to plaintiff, nor did the fact that it was

negligently repaired. It was in causing the sewage to overflow plaintiff's premises, and that alone, which induced the injury and gave plaintiff her cause of action. This was the fault of the city and the defendants, her officers, alike. Whether it was caused by their joint or several acts is immaterial. It would be subordinating substance to mere form to say that these two actions do not under the circumstances rest upon one and the same cause. This being so, and it appearing that plaintiff had been once compensated for the injury suffered, the court below was right in denying her a second award of damages for the same act.

It does not result from this, however, that the plaintiff is not entitled to her costs in the present action. While one may have a cause of action against two or more persons for the same act, it does not follow necessarily that he can sue them jointly. "There must be something more than the existence of two separate causes of action for the same act or default to enable him to join the two parties liable in the single action." (Pomeroy's Code Remedies, sec. 308.) The injury suffered must be in some sense the result of their joint work. Here, while the injury was from one common cause, it cannot, we think, be said to have been produced by the same fault or act of the city and Ashworth. The act of the former which conduced to the cause of injury was the neglect to repair the broken sewer; while the act of the latter was the negligent repair and stopping up thereof. These two acts produced the cause from which plaintiff suffered, but they were not joint in a sense which would make the city and Ashworth joint tortfeasors and liable to be sued in a common action. While plaintiff had a right of action therefor against each separately, she could not sue them jointly, and while she can have but one satisfaction in damages, the case is not within section 1023 of the Code of Civil Procedure, which prevents the recovery of costs in more than one action where the defendants, sued separately, "might have been joined as defendants in the same action."

We think the order of the court below was right in both respects appealed from, and it follows that it should be affirmed, each appellant to pay his own costs on appeal.

It is so ordered.

GAROUTTE, J., and HARRISON, J., concurred.

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[No. 18356. Department One.—December 31, 1895.]

W. A. SEHORN, RESPONDENT, *v.* JOHN WILLIAMS,  
AUDITOR OF THE COUNTY OF GLENN, APPELLANT.

CONSTRUCTION OF COUNTY GOVERNMENT ACT—CLAIMS AGAINST COUNTY—PROVINCE OF SUPERVISORS—DUTY OF AUDITOR—CERTIFICATE OF COUNTY CLERK.—The provision of section 41 of the County Government Act requiring a claim presented to the board of supervisors to be itemized, "giving names, dates, and particular services rendered," before it can be allowed, is directed to the board of supervisors alone, and there is no provision in the act giving the auditor a revisory control over their action; but the auditor is in duty bound to draw his warrant in favor of every person whose claim has been legally examined, allowed, and ordered to be paid by the board of supervisors; and the provisions of sections 45 and 114 of the act do not justify him in withholding a warrant merely because the clerk has not certified the items of the claim, or the liability for which it was allowed; but it is his duty in such case to ascertain by inquiry the nature of the liability in order to distinctly specify it in the warrant, and that the claim has been allowed and ordered paid by the board of supervisors, and, upon receiving such information from the county clerk, it is his duty to draw the warrant.

- APPEAL from a judgment of the Superior Court of Glenn County and from an order denying a new trial.  
SETH MILLINGTON, Judge.

The facts are stated in the opinion of the court.

*Charles L. Donohoe*, for Appellant.

*Benjamin F. Geis*, for Respondent.

The auditor cannot assume to set up his judgment in opposition to that of the board of supervisors, in respect to issuance of a warrant on an account against

the county. (*Babcock v. Goodrich*, 47 Cal. 489.) The action of the board was conclusive, and the auditor is estopped from questioning its correctness. (*El Dorado County v. Elstner*, 18 Cal. 149; *Bank of California v. Shaber*, 55 Cal. 327; *People v. Fitzgerald*, 54 How. Pr. 1.)

HARRISON, J.—The plaintiff presented to the board of supervisors of the county of Glenn a claim for sixty dollars, properly itemized and verified, for services rendered by him under a contract with the county for carrying meals to the county jail, and the same was allowed by the board at its session May 10, 1893, and ordered paid out of the common fund, and the auditor was directed to draw his warrant for said sum in favor of the plaintiff. Upon a demand by the plaintiff for said warrant, the defendant, who was the auditor of the county, refused to draw the same, and thereupon the plaintiff instituted this proceeding for a mandate compelling him to draw the warrant.

Section 113 of the County Government Act (Stats. 1891, p. 322) provides: "The auditor must draw warrants on the county treasurer in favor of all persons entitled thereto, in payment of all claims and demands chargeable against the county, which have been legally examined, allowed, and ordered paid by the board of supervisors; provided, however, that the auditor must not draw a warrant on the county treasurer in favor of any person until said auditor shall have received from the clerk of the board of supervisors the certified list mentioned in subdivision 4, section 20, of this act." The "certified list" herein referred to, and which the clerk is required to deliver to the auditor, is a list "of all claims allowed and orders made for the payment of money, giving the name of the claimant or payee named in the claim or order, the amount and date of each claim or order, and the date of the allowance thereof."

In the present case the clerk delivered to the auditor a list, in which was given the name of the plaintiff and the amount allowed, in the following form:



Name of Claimant.	What For.	Amount of Claim.	Amt. Allowed. \$60.
Sehorn, W. A.			

Under the heading "What for" there had been written "jailer," and under the heading "Amount of claim" there had been written "\$60." But, before the list was delivered to the auditor, these items had been erased by drawing lines through the words.

It is contended on behalf of the auditor that he was not required to draw his warrant, for the reason that the list delivered to him by the clerk does not specify the liability for which the claim was allowed by the board of supervisors. The statute does not, however, require the clerk, in the list which he delivers to the auditor, to specify the liability for which the claim was allowed. The auditor is required by section 113 to draw his warrant in favor of every person whose claim "has been legally examined, allowed, and ordered paid by the board of supervisors." If he has received from the clerk a properly certified list of the claims allowed, he must upon demand draw his warrant in favor of the claimant whose name is found therein. The provision in section 41 of the act requiring the claim to be itemized, "giving names, dates, and particular services rendered," before it can be allowed, is directed to the board of supervisors alone, and there is no provision in the County Government Act giving to the auditor a revisory control over their action. (*McFarland v. McCowen*, 98 Cal. 329.)

The provisions of section 45 and section 114 do not justify the auditor in withholding the warrant merely because the clerk shall not have certified the items of the claim or the liability for which it was allowed. These sections are as follows:

"SEC. 45. Warrants drawn by order of the supervisors on the county treasury for the current expenses during each year must specify the liability for which they are drawn, and when they accrued, and must be paid in the order of presentation to the treasurer."

"SEC. 114. All warrants must distinctly specify the liability for which they are drawn, and when it accrued."

The statute does not prescribe the mode in which the auditor shall ascertain the facts which will enable him to comply with the provisions of these sections relating to the form of the warrant, and, in the absence of any provision therefor, it is his duty to take such steps or obtain such information as will enable him to properly comply with the sections. In the present case he testified that, after he had received the certified list, and before the plaintiff demanded his warrant, being in doubt, by reason of the erasures in the list, he ascertained, by inquiry from the county clerk, that the plaintiff's claim, as it appears on that list, had been allowed and ordered paid by the board of supervisors. Upon receiving this information, his duty to draw the warrant was clear.

The judgment and order are affirmed.

GAROUTTE, J., and VAN FLEET, J., concurred.

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[Sac. No. 49. Department One.—December 31, 1895.]

**WILLIAM CONLAN, RESPONDENT, v. JOHN SULLIVAN ET AL., APPELLANTS.**

**CONVEYANCE OF LAND—MISTAKE OF VENDOR—FRAUD OF VENDEES—RESCISSION.**—Where the vendor of a lot, by mistake of fact, believing that it was mortgaged for \$500, whereas such mortgage was only upon another lot, offered to sell it for \$200 in cash, and the balance of \$500 to be paid upon the mortgage, and the vendees, upon inquiry, learning that the mortgage did not include the lot offered to be sold, and with intent to defraud the vendor of \$500, paid the purchase price of \$200 cash, and received the conveyance of the land, and, upon discovery of the mistake by the vendor, and a demand by him that the \$500 be paid to him or to his mortgagee, in satisfaction of the mortgage, upon the other lot, the vendees refused to make such payment, whereupon the vendor tendered back the money, with interest, and demanded a reconveyance, which tender and demand were also refused, the vendor is entitled to have the contract set aside in a court of equity, and the property reconveyed.

Id.—EXPENDITURE OF MONEY BY VENDEES—INCREASE OF VALUE—FINDINGS—PLEADING.—Where the court finds that the vendees expended money upon the property purchased, but made no finding as to the increased value of the property by reason of the expenditure, and there is no allegation in the answer that such expenditure had increased the value of the realty, the vendees are not entitled to a reimbursement of the amount expended.

APPEAL from a judgment of the Superior Court of Butte County. J. C. GRAY, Judge.

The facts are stated in the opinion of the court.

*Rearden & White*, for Appellants.

\* The mere failure of consideration will not entitle the vendor to rescind the contract and recover back the land. *Lawrence v. Gayetty*, 78 Cal. 134; 12 Am. St. Rep. 29.) The facts alleged are not sufficient to entitle the plaintiff to the relief demanded, because of inadequacy of consideration. (*Nicholson v. Tarpey*, 70 Cal. 609.) The facts stated do not entitle the plaintiff to relief upon the ground of mistake. Such a mistake must not be caused by the neglect of a legal duty on the part of the person making it. (Civ. Code, sec. 1577; 1 Story's Equity Jurisprudence, sec. 195.) Having readily accessible means of acquiring knowledge of a fact, which might be ascertained by inquiry, is equivalent to notice and knowledge of it. (*Montgomery v. Keppel*, 75 Cal. 131; 7 Am. St. Rep. 125; *Board of Commrs. v. Younger*, 29 Cal. 176; *Champion v. Woods*, 79 Cal. 20; 12 Am. St. Rep. 126.) In order to entitle a party to rescind for fraud, he must show that some damage has resulted to him therefrom. (*Bailey v. Fox*, 78 Cal. 398.) One who rescinds must place the other party *in statu quo*. (*Collins v. Townsend*, 58 Cal. 608.)

*John M. McGee and John Gale*, for Respondent.

The making of a promise without any intention at the time of performing it is of itself a fraud. (*Lawrence v. Gayetty*, 78 Cal. 126; 12 Am. St. Rep. 29; Civ. Code, sec. 1572; Bigelow on Fraud, 485, et seq.) If a

man conceals a fact that is material to the transaction, knowing that the other party acts on the presumption that no such fact exists, it is as much a fraud as if the existence of such fact were expressly denied, or the reverse of it is expressly stated. (Kerr on Fraud and Mistake, 94.) Plaintiff was entitled to a rescission on the ground of mistake of fact. (Civ. Code, sec. 1577.) Equity follows the law as to title to improvements. (*Billings v. Hall*, 7 Cal. 8, 9; *Ferris v. Coover*, 10 Cal. 632.)

**THE COURT.**—This is an action of rescission. The findings of the court were in accord with the allegations of the complaint, and judgment went for plaintiff. The appeal is from the judgment, and the merits of the case will be determined by a consideration of the sufficiency of the complaint in stating a cause of action.

It appears substantially from the complaint that plaintiff owned a lot worth \$700. By reason of a mistake of fact, he fully believed that it was mortgaged for \$500, when it was another and different lot that was so mortgaged. He offered to sell the lot to appellants for \$700, \$200 to be paid in cash, the balance, \$500, to be paid on the mortgage. The appellants, through their attorney, telephoned to the recorder and learned that respondent was mistaken, and that the lot was not encumbered at all. Then they agreed to buy the lot and pay therefor, \$700, to be paid as above stated. They did not intend to keep this agreement, but did intend to take advantage of respondent's mistake, and to obtain the property for \$200, and to defraud him of the balance of the purchase price, \$500. The \$200 was paid, and the transfer made. Subsequently the plaintiff ascertained his mistake, and demanded that the \$500 be paid to him, or his mortgagee, in satisfaction of the mortgage upon the other lot. Defendants refused so to do. Plaintiff thereupon tendered the \$200 received, with interest, and demanded a reconveyance, which tender and demand were also refused. We think the

foregoing statement of facts sufficient to justify relief by a court of equity, and that the contract should be set aside.

The court made a finding to the effect that defendants had expended \$282 upon the property, but made no finding as to the increased value of the property by reason of this expenditure of money. The mere expenditure of money upon the property by defendants is not sufficient to justify a reimbursement of the amount expended. Perchance such expenditure did not add a dollar to the actual value of the realty. In addition, there is no allegation that such expenditures had increased to any degree the value of the realty.

For the foregoing reasons the judgment is affirmed.

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[Sac. No. 13. Department One.—December 31, 1895.]

**J. P. KEENER, RESPONDENT, v. EAGLE LAKE LAND AND IRRIGATION COMPANY, APPELLANT.**

**SUMMONS—PROOF OF SERVICE UPON CORPORATION—SUFFICIENCY OF AFFIDAVIT.**—In an action against a corporation, an affidavit of service of summons stating that it was personally served upon a designated person, described as the managing agent of the corporation, by delivering to such managing agent personally a copy of the summons attached to a copy of the complaint, sufficiently shows that the service was made upon the corporation, and is *prima facie* proof that the person served was its managing agent upon whom the summons was authorized to be served for the corporation.

**ID.—LABORER'S LIEN—CONSTRUCTION OF STATUTE—PLEADING—TERMS OF STATUTE.**—The act of March 31, 1891, giving a lien to mechanics and laborers employed by a corporation for wages earned by and due them weekly or monthly, applies only to corporations doing business in the state who employ laborers or mechanics by the week or month, and whose wages under the terms of their employment are payable weekly or monthly; and a plaintiff seeking to enforce the lien given by that statute must bring himself within the terms stated, and aver that the wages due him were earned weekly or monthly.

**ID.—FILING NOTICE OF LIEN.**—A laborer does not acquire any right to enforce a lien under the act of 1891 by reason of filing a notice of mechanic's lien.

**ID.—ALLOWANCE OF COUNSEL FEES.**—Where there is no lien to be enforced there can be no allowance of counsel fees in the action.

APPEAL from a judgment of the Superior Court of Lassen County. W. T. MASTEN, Judge.

The facts are stated in the opinion of the court.

*Goodwin & Goodwin*, for Appellant.

The judgment is void for the reason that there is no proof of service of summons upon the defendant. It does not appear from the allegations of the complaint that the defendant is either a foreign or a domestic corporation, and the affidavit does not show that Elledge was the managing agent of the corporation at the time of the service. (Code Civ. Proc., sec. 411; *Hobson v. Hassett*, 76 Cal. 203; 9 Am. St. Rep. 193; *Loup v. California etc. R. R. Co.*, 63 Cal. 99; *Bidwell v. Babcock*, 87 Cal. 33; 1 Freeman on Judgments, 14th ed., sec. 126; Boone on Corporations, sec. 152; *Kennedy v. Hibernia Sav. etc. Soc.*, 38 Cal. 151; *People v. Central Pac. R. R. Co.*, 83 Cal. 398; *Blanc v. Paymaster Min. Co.*, 95 Cal. 531; 29 Am. St. Rep. 149; *Great West Min. Co. v. Woodmas etc. Min. Co.*, 12 Col. 46; 13 Am. St. Rep. 204.) The lien given to laborers by the act of 1891 is made to depend upon the concurrence of the two facts that the corporation is doing business in this state, and that it neglects to pay the mechanics and laborers employed by it the wages earned by and due them weekly or monthly. (Stats. 1891, p. 195.)

*Shinn & Shinn*, and *F. A. Kelley*, for Respondent.

There is no difference between a domestic and a foreign corporation, so far as service of summons upon the managing agent is concerned. (Code Civ. Proc., sec. 411.) The return is *prima facie* evidence that Elledge was the managing agent of defendant. (*Rowe v. Table Mountain Water Co.*, 10 Cal. 442; *Golden Gate etc. Min. Co. v. Superior Court*, 65 Cal. 187.) If there is any allegation that the defendant is a corporation, it is sufficient, although defectively stated. To defeat the action there must be an entire absence of averment. (Ames-

*toy v. Electric etc. Co.*, 95 Cal. 311; *Hallock v. Jaudin*, 34 Cal. 168; *Hentsch v. Porter*, 10 Cal. 559; *Hibernia etc. Soc. v. Ordway*, 38 Cal. 682.) A hiring at a monthly rate is presumed to be for a month, wages to be paid when the service—one month's labor—has been performed. (Civ. Code, secs. 2010, 2011.)

HARRISON, J.—The plaintiff under an employment by the defendant performed labor upon certain reservoirs, dams, and ditches belonging to the defendant, at different times between May 27, 1892, and June 23, 1893, amounting in the aggregate, according to the agreed rate of compensation, to the sum of eight hundred and sixty-eight dollars and seventy-five cents, of which he was paid the sum of three hundred and seventy-eight dollars and eighty-two cents. He brings this action to recover from the defendant the balance thereof, viz., four hundred and eighty-eight dollars and ninety-three cents, and to have that sum adjudged to be a lien upon the property of the defendant. Judgment by default was rendered in his favor, and the defendant has appealed.

1. The appellant urges that the judgment is void by reason of there being no proof of service of the summons upon the defendant. The service was made by a private individual, and, in his affidavit, he states that "he personally served the same upon J. H. Elledge, the managing agent of the above-named defendant, Eagle Lake Land and Irrigation Company, a corporation, on the thirteenth day of January, 1894, by delivering to said J. H. Elledge, the said managing agent of said defendant (corporation), personally, in the county of Lassen, state of California, a copy of said summons attached to a true copy of the complaint, . . . and that he knows the person so served to be the person acting as managing agent for said defendant (corporation) named in said action." It is objected that this affidavit merely shows that the service was made upon Elledge, and does not show that it was made upon the corporation. It

would be sacrificing substance to form to hold that this service was not made upon the defendant. It sufficiently appears from the complaint that the defendant is a corporation, and the corporation is the only defendant in the action. The affidavit of service upon one who is named the managing agent of the corporation is *prima facie* proof that he was such officer, and the statute authorizes the service to be made upon him for the corporation. (*Rowe v. Table Mountain Water Co.*, 10 Cal. 442; *Golden Gate etc. Min. Co. v. Superior Court*, 65 Cal. 187.) If Elledge had been a codefendant with the corporation, and the return of service had shown that only one copy of the summons had been delivered to him, there would be some reason for holding that it was a personal service upon him alone; but, as the corporation is the sole defendant, that reason does not exist.

2. The appellant does not contest the amount for which judgment was given, but contends that the judgment was erroneous in declaring that the plaintiff is entitled to a lien therefor upon its property. The plaintiff relies in support of the judgment upon the act passed March 31, 1891. (Stats. 1891, p. 195.) That act is as follows:

"SECTION 1. Every corporation doing business in this state shall pay the mechanics and laborers employed by it the wages earned by and due them weekly or monthly, on such day in each week or month as shall be selected by such corporation.

"SEC. 2. A violation of the provisions of section 1 of this act shall entitle each of the said mechanics and laborers to a lien on all the property of said corporation for the amount of their wages, which lien shall take preference over all other liens, except duly recorded mortgages or deeds of trust."

By the terms of the first section of this act, it does not apply to all corporations, but only to those who, while doing business in this state, employ laborers and mechanics by the week or month, whose wages, under the terms of their employment, are payable weekly or



monthly. It does not purport to impose upon those corporations any duty or liability toward all the mechanics or laborers whom it may employ, or to create a right in favor of those of its employees whose wages are not earned or payable by the week or by the month. As the remedy sought to be enforced herein exists only by virtue of the statute, it was incumbent upon the plaintiff to bring himself within the terms of the statute, and to show that the wages earned by him were "due weekly or monthly." His complaint is, however, defective in this respect, and contains no allegation concerning the times at which the wages were payable, or that he was employed at weekly or monthly wages, and from the allegations in reference thereto it would seem that there was no agreement upon this point—the greater part of his labor being computed by the day, and at different rates per day for different periods during the year.

The plaintiff did not acquire any right to enforce a lien by reason of the notice of mechanic's lien filed by him. As he was employed by the corporation, if he would rely upon the lien given by the provisions of the Code of Civil Procedure, his notice of lien should have been filed within thirty days after the completion of the work or improvement on which he had expended his labor. As it appears from the notice of lien attached to his complaint that the works were incomplete at the time it was filed, his notice was premature, and failed to confer a right of lien. (*Davis v. MacDonough*, 109 Cal. 547.) It is conceded by the plaintiff that this notice of lien was insufficient, within the requirements of the mechanics' lien law, but he contends that his lien exists by virtue of the act of 1891. That act, however, makes no provision for filing a claim of lien, but purports to create the lien upon the violation by the corporation of section 1.

As the plaintiff is not entitled to avail himself of the provisions of the act of 1891, that provision of the judgment allowing him counsel fees was unauthorized.

The judgment in favor of the plaintiff for the sum of four hundred and eighty-eight dollars and ninety-three cents and costs of suit is affirmed. That portion of the judgment awarding counsel fees, and declaring that the plaintiff is entitled to a lien upon the property of the defendant, and directing a sale of such property, is reversed.

GAROUTTE, J., and VAN FLEET, J., concurred.

Hearing in Bank denied.

BEATTY, C. J., dissented from the order denying a hearing in Bank.

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[Sac. No. 52. Department One.—December 31, 1895.]

**VISALIA & TULARE RAILROAD COMPANY, RESPONDENT, *v.* R. E. HYDE, APPELLANT.**

**CORPORATIONS—ASSESSMENT FOR UNPAID SHARES—LIABILITY OF TRANSFEREE OF STOCK.**—One who purchases unpaid stock in a corporation, and causes a transfer thereof to himself to be entered upon the books of the corporation, is substituted for the original subscriber of the stock as a stockholder of the corporation, and thereafter holds the stock on the same conditions and subject to the same obligations as the original stockholder prior to the transfer; and he is liable for an assessment upon the unpaid shares, of which liability he cannot divest himself by an assignment of the shares subsequent to the levy of the assessment.

**ID.—LIABILITY FOR ASSESSMENT DETERMINED BY BOOKS.**—For the purpose of ascertaining those who are liable to the corporation for the amount of an assessment, the corporation may look only to the list of stockholders as their names are registered upon its books.

**ID.—DEFENSE TO ASSESSMENT—TIME OF INCURRING OF LIABILITY—SUFFICIENCY OF PROPERTY OF CORPORATION—DISCRETION OF DIRECTORS.**—It is no defense to an action to recover the amount of an assessment that it is required to meet outstanding obligations which were contracted before the defendant became a stockholder, nor is it any defense that the corporation has sufficient property with which to meet its obligations; but the liability of the stockholder for the unpaid portion of a subscription rests upon the contract of subscription, and the propriety or necessity of requiring him to pay it, for the purpose of meeting the corporate liabilities, rather than to resort to property in the hands of the corporation to meet such liabilities, is in the discretion of the board of directors.

APPEAL from a judgment of the Superior Court of Tulare County and from an order denying a new trial. WHEATON A. GRAY, Judge.

The facts are stated in the opinion of the court.

*Lamberson & Middlecoff*, for Appellant.

As no contract of defendant to pay for the stock or to pay the indebtedness of Creighton is alleged, the cases in this state in which an original subscriber is held liable on express or implied contract are not in point. (*Jenkins v. Union Turnpike Co.*, 1 Caines Cas. 86; 2 L. C. ed. 724.) Where there is a right of forfeiture given, either by the act of incorporation or by the terms of the subscription, neither the subscriber to the stock nor the transferee is personally liable to the corporation for calls. (2 Beach on Private Corporations, sec. 588; *Fort Miller etc. Co. v. Payne*, 17 Barb. 577.) Creighton was a stockholder at the time the Healy claim accrued, and his personal liability attached at once, and was never terminated by the transfer of his stock. (*Welsh v. Bramlet*, 98 Cal. 223.) The liability of the stockholder is established by the fact of ownership of shares at the time the liability is incurred. (Angell and Ames on Corporations, sec. 549; *West v. Crawford*, 80 Cal. 19; *California etc. Co. v. Callender*, 94 Cal. 120; 28 Am. St. Rep. 99; *Kohler v. Agassiz*, 99 Cal. 9.)

*Hannah & Müller*, for Respondent.

A transfer of shares in a corporation means the substitution of a new shareholder in place of an outgoing shareholder in the company, and an assumption by the former of all the rights and obligations which attached to the transferring shareholder by reason of his ownership of the shares. This involves a novation of the contract of membership. (Morawetz on Private Corporations, secs. 145, 159-64, 170; Beach on Private Corporations, secs. 61, 125, 126, 705, 707; Cook on Stock and Stockholders, secs. 234-66.) The code provides two methods

for the enforcement of the liabilities of stockholders to the corporation for assessments. One by the sale of the stock, the other by a personal action. Such liability does not depend on an express promise to pay such assessment. (Civ. Code, sec. 349; *San Joaquin etc. Co. v. Beecher*, 101 Cal. 70; *Green v. Abietine Medical Co.*, 96 Cal. 322; *Gay v. Dare*, 103 Cal. 460; *Spelling on Private Corporations*, sec. 501; *Castellan v. Hobson*, L. R. 10 Eq. 47.) The liability of the shareholders to contribute the amount of their shares as capital is treated in equity as assets, like other legal claims belonging to the corporation. (Morawetz on Private Corporations, sec. 820; Cook on Stockholders, sec. 199; Beach on Corporations, sec. 116; *Harmon v. Page*, 62 Cal. 448; *Tatum v. Rosenthal*, 95 Cal. 129; 29 Am. St. Rep. 97; *Baines v. Babcock*, 95 Cal. 581; 29 Am. St. Rep. 158.) The necessity of the call is not open to question by the stockholders. The determination of that question is for the board of directors. (*Budd v. Multnomah Street Ry. Co.*, 15 Or. 413; 3 Am. St. Rep. 169; Morawetz on Private Corporations, sec. 150; Cook on Stocks and Stockholders, sec. 113.) Article XII, section 3, of the constitution was adopted, and section 322 of the Civil Code was passed to establish and limit the liability of stockholders to creditors of the corporation, and not to establish, fix, or limit the liability of stockholders to the corporation itself, or to each other. (*Baines v. Babcock*, *supra*; Morawetz on Private Corporations, sec. 869.) The liability of stockholders to creditors arises upon a contract which may be waived by the creditor. (Morawetz on Private Corporations, sec. 870-73; *Dennis v. Superior Court*, 91 Cal. 548; *Kennedy v. California Savings Bank*, 97 Cal. 93; 33 Am. St. Rep. 163; *Robinson v. Bidwell*, 22 Cal. 379; *French v. Teschemaker*, 24 Cal. 518.)

HARRISON, J.—The plaintiff is a corporation under the laws of this state, for the purpose of constructing and operating a railroad between the city of Visalia

and the town of Tulare, and was incorporated November 1, 1887, with a capital stock of one hundred thousand dollars, divided into one thousand shares of one hundred dollars each, all of which was subscribed for, and upon each share of which stock there had been paid into the corporation the sum of fifty dollars. On March 28, 1894, the directors of the corporation levied an assessment of ten dollars upon each share of the capital stock, and in the order levying the assessment fixed a day on which the stock would be delinquent, and also a day for the sale of the delinquent stock. After the day specified for declaring the stock delinquent, and before the sale, the board of directors, by an order in that behalf, elected to waive and abandon further proceedings for the collection of the assessment by a sale of the stock, and to proceed by action to recover the amount that should be delinquent. November 29, 1890, the defendant became the owner of one hundred shares of the capital stock which had been originally subscribed for by Thomas Creighton, and on that day a certificate for said one hundred shares of stock was issued to and received by him, and he was then registered on the books of the plaintiff as the owner thereof, and has since remained registered as such stockholder. The present action is brought to recover from him the amount of the assessment, by virtue of the provisions of section 349 of the Civil Code. The answer to the complaint does not question the regularity of the steps taken in levying the assessment, or in the election of the plaintiff to proceed by action to collect the same, or that the plaintiff was indebted in an amount greater than the amount of the assessment; but sets up as special defenses that, at the time the plaintiff incurred the liability for which he alleges the assessment was levied, he was not a stockholder; that prior to the commencement of the action he had sold, indorsed, and delivered the shares of stock to another person; and that at the time of levying the assessment the plaintiff had sufficient property with which to meet all of its obligations,

without levying an assessment therefor. The plaintiff had judgment and the defendant has appealed.

1. By purchasing the stock from Creighton, and causing a transfer thereof to himself to be entered upon the books of the plaintiff, the defendant was substituted for Creighton as a stockholder of the corporation, and thereafter held the shares on the same conditions, and subject to the same obligations, as did Creighton prior to the transfer. (Morawetz on Corporations, sec. 159; Cook on Stock and Stockholders, sec. 256; *Hall v. United States Ins. Co.*, 5 Gill, 484; *Hartford etc. R. R. Co. v. Boorman*, 12 Conn. 530; *Upton v. Hansbrough*, 3 Biss. 417; *Merrimac Min. Co. v. Bagley*, 14 Mich. 501.) In the case last cited the court say: "The very essence of a corporation consists in its corporate succession, which, in stock companies, is kept up by the substitution of one owner for another in the proprietorship of shares. If the original stockholders stand under different relations to the company from their assigns, the corporation itself loses some of its attributes by the substitution, or else becomes introduced into more complicated relations. It seems to be an unavoidable conclusion that every liability which attaches to a stockholder, as such, is inseparable from the ownership of the stock." And in *Hartford etc. R. R. Co. v. Boorman*, *supra*, it is said: "The reasons for subjecting the original subscribers to personal liability apply with equal force to those who become stockholders by purchase. The relation of stockholder and company exists. A privity between them is created."

The defendant did not divest himself of this liability by an assignment of the certificate to another subsequent to the levy of the assessment, especially as his assignee did not procure a transfer to himself upon the books of the corporation. For the purpose of ascertaining those who are liable to it for the amount of the assessment, the corporation can look only to the list of stockholders as their names are registered upon its books.

2. The liability of the defendant to the creditors of the corporation for his proportion of their claims against the corporation, and his liability to the corporation for the unpaid portion of his subscription, are entirely distinct, and rest upon different principles. The stockholder is liable to a creditor upon only such liabilities as were incurred during the time he has been a stockholder, but he is liable to the corporation for the unpaid portion of his subscription, whenever the corporation may choose to call it in; and, while the creditor may enforce his claim against the corporation, and seek its entire satisfaction out of the corporate property, he can recover from the stockholder only his proportionate part of the claim. The corporation is authorized to levy an assessment for the express purpose of providing a fund with which to meet its outstanding obligations, and it is no defense to the assessment that the defendant was not a stockholder at the time the obligation was contracted or the liability incurred. Nor is it any defense that the corporation has sufficient property with which to meet its obligations. The liability of the defendant rests upon his contract of subscription, and the propriety or necessity of requiring him to pay it for the purpose of meeting the corporate liabilities, rather than to resort to property in the hands of the corporation with which to meet such liabilities, has been placed in the discretion of the board of directors.

The judgment and order are affirmed.

GAROUTTE, J., and VAN FLEET, J., concurred.

[No. 15972. Department Two.—December 31, 1895.]

**CHARLES KROUSE, RESPONDENT, v. JOHN A. WOODWARD, APPELLANT.**

**CORPORATIONS—PLEDGE OF STOCK—SPECIFIC PERFORMANCE.**—The pledgor of shares of stock in a corporation is entitled to a specific performance of the contract for return of the stock, upon payment or tender of the amount of the indebtedness to secure which it was pledged, if it appears that the stock has no market or ascertainable value, and that the pledgor purchased it for investment with a view to anticipated increase in value, and that he cannot purchase other shares in the corporation for the reason that no holder will sell them.

**ID.—TRANSFER OF CERTIFICATE BY PLEDGEE—BONA FIDE PURCHASER—LIABILITY OF PLEDGEE.**—Where there is no difference in the value of the shares, and the certificate of stock pledged has been conveyed by the pledgee to a *bona fide* purchaser for value, the court may compel the pledgee to convey stock owned by him in lieu of the certificate received from the pledgor.

**ID.—PLEDGE FOR PURCHASE MONEY BORROWED.**—The right of the pledgor to redeem the pledge, and insist upon the return of the shares of stock pledged, is not affected by the fact that he borrowed from the pledgee the money with which he purchased the stock.

**APPEAL** from a judgment of the Superior Court of Santa Clara County. W. G. LORIGAN, Judge.

The facts are stated in the opinion of the court.

*Jackson Hatch, E. M. Rosenthal, and S. F. Lieb, for Appellants John A. Woodward and W. I. Alexander.*

The jurisdiction of a court of equity to decree specific performance depends upon the question whether the breach complained of can be adequately compensated in damages or not. (*Senter v. Davis*, 38 Cal. 453; *Leach v. Day*, 27 Cal. 643.) Generally speaking, a bill in equity to redeem will not lie on behalf of the pledgor or his representatives, as his remedy is at law upon a tender of the money. (*Doak v. Bank of State*, 6 Ired. 319; *Jones on Pledges*, sec. 556; *Genet v. Howland*, 45 Barb. 560; *Durant v. Einstein*, 35 How. Pr. 223, and other cases cited in *Jones on Pledges*, sec. 556; *Edwards on Bailments*, 3d ed., sec. 314; *Angus v. Robinson*, 62 Vt. 60.) Krouse, by his own conduct in delivering certificate No. 7, in-



dorsed in blank to Woodward, and thereby enabling the latter to sell the same, was estopped from making any claim against an innocent purchaser of the stock. (*Brewster v. Sime*, 42 Cal. 139, and cases there cited; *Woodsum v. Cole*, 69 Cal. 144.) The lower court exceeded its jurisdiction in requiring Woodward to replace out of his own stock the stock which he sold to Alexander. (*Ferguson v. Wilson*, 2 L. R. Ch. App. 87.) Full provision is made by our Civil Code for the relief which may be granted in given cases by the courts of this state. As the code does not specify the relief granted by the lower court, it was error to grant it. (Civ. Code, secs. 20, 3274-3423.) The value of the property could easily have been ascertained by proper evidence. (*Brinkerhoff etc. Co. v. Home Lumber Co.*, 118 Mo. 447.)

*W. C. Kennedy*, and *Wilcox & Patton*, for Respondent.

Whenever a pledgee has assigned the pledge without the consent of the owner, the pledgor has the right in equity to demand the replacing of the stock in his hands, if the pledgee has equivalent stock. (*Smith v. Quartz Min. Co.*, 14 Cal. 242; *Treasurer v. Mining Co.*, 23 Cal. 390; *Hardenbergh v. Bacon*, 33 Cal. 356; *Atkins v. Gamble*, 42 Cal. 86; 10 Am. Rep. 282; *Thompson v. Toland*, 48 Cal. 99; *Hayward v. Rogers*, 62 Cal. 372; Cook on Stock and Stockholders, sec. 475; 1 Morawetz on Private Corporations, sec. 219; 1 Pomeroy's Equity Jurisprudence, sec. 164; 3 Pomeroy's Equity Jurisprudence, sec. 1231; 2 Beach on Corporations, sec. 463; *Loughborough v. McNevin*, 74 Cal. 250; 5 Am. St. Rep. 435; *Johnson v. Brooks*, 93 N. Y. 342; *Adams v. Messenger*, 147 Mass. 185; 9 Am. St. Rep. 679; *Draper v. Stone*, 71 Me. 175; *Fowle v. Ward*, 113 Mass. 548; 18 Am. Rep. 534; *Fay v. Gray*, 124 Mass. 500; *Beardsley v. Beardsley*, 138 U. S. 262.) The complaint also states that the stock is of uncertain value, unpurchasable in the market, and held for purposes of profit, investment, and speculation. Upon these facts alone plaintiff is entitled to his equitable remedy. (1 Morawetz on Private Corporations,

sec. 218; 2 Beach on Private Corporations, sec. 464; 3 Pomeroy's Equity Jurisprudence, sec. 1402; *Ayer v. Seymour*, 5 N. Y. Supp. 651; *Cushman v. Thayer Mfg. Co.*, 76 N. Y. 365; 32 Am. Rep. 315.)

TEMPLE, J.—This action was brought to recover from appellant twenty shares of stock in the defendant corporation. Plaintiff avers ownership of the stock on the twenty-fifth day of August, 1893, represented by certificate No. 7, then issued to him, and that he still owns the same; that the stock is of uncertain value; that the stock of said company has no known or fixed market value, and that plaintiff purchased said stock with a view of retaining the same for purposes of profit, investment, and speculation; that he became indebted to Woodward in the sum of four hundred dollars, for which sum Woodward held his promissory note; that he delivered to said Woodward said certificate as a pledge to secure the payment of said note; that afterward, on January 9, 1894, the note being due, he tendered to Woodward the amount due on said note, and demanded the return of the stock and of said note, both of which demands Woodward refused to comply with; that seven days afterward Woodward pretended to sell said stock to defendant Alexander. Said pretended sale was without consideration, and was made to deprive plaintiff of his stock; that Alexander had full knowledge of plaintiff's rights, and that the certificate was held by Woodward as a pledge.

It was also charged that Woodward now owns and holds more than twenty shares of the capital stock of the corporate defendant; that said Woodward threatens to sell all of his stock, and, unless enjoined, will do so.

The tender of the money to Woodward was kept good, and plaintiff asked that plaintiff be declared the owner of certificate No. 7, and of said stock, and that said certificate be delivered to him, or, in case this cannot be done, that he recover twenty shares of the same stock now owned by Woodward.

Answers were put in by the defendants, in which practically all the allegations of the complaint were denied. The court found the allegations of the complaint stated above to be true, except that the court found that Alexander purchased the stock from Woodward in good faith, and for a valuable consideration, to wit, for four hundred and fifty dollars, then paid by him. The court also found that Woodward, although not owning the certificate of stock, was by the act of the plaintiff clothed with the apparent ownership, and, inasmuch as Alexander purchased without knowledge of the infirmity of Woodward's title, he acquired a good title.

The court by its decree required Woodward to convey to plaintiff twenty shares of the stock which he owned and held in the same corporation, in lieu of plaintiff's stock which he had wrongfully sold to defendant Alexander. From this judgment the defendant Woodward brings this appeal upon the judgment-roll alone.

1. Appellant's first contention is that plaintiff has an adequate remedy at law, and is, therefore, not entitled to equitable relief.

It appears somewhat singular that upon this proposition the peculiar language of our code has never been noticed. As originally enacted, section 3384 of the Civil Code read as follows:

"Except as otherwise provided in this article, the specific performance of an obligation may be compelled:

1. When the act to be done is in the performance, wholly or partly, of an express trust; 2. When the act to be done is such that pecuniary compensation for its non-performance would not afford adequate relief; 3. When it would be extremely difficult to ascertain the actual damage caused by the nonperformance of the act to be done; or 4. When it has been expressly agreed, in writing, between the parties to the contract, that specific performance thereof may be required by either party, or that damages shall not be considered adequate relief."

In 1874 this section was amended by striking out all the subdivisions. This apparently establishes the rule

that all obligations may be specifically enforced, unless it is otherwise provided in that title, and not that certain specified obligations may be specifically enforced. At the same time section 3385, which provides that where one party was entitled to specific performance the other was also entitled to the remedy, although not within the rule as then established in section 3384, was repealed. Then follow quite a number of instances in which it is expressly provided that specific performance cannot be enforced. It would seem that it was intended to reverse the usual test as to the jurisdiction of a court of equity to enforce specific performance of a contract, and to place the burden upon the party resisting such action to show that the case in hand is within some exception. The subdivisions of section 3384 stricken out contain a concise statement of the jurisdiction of courts of equity as stated in the text-books.

This amendment was made in 1874, and there are numerous cases since in which it has been assumed that the rule was as established by the decisions of courts of equity. It is not necessary here to determine whether the jurisdiction of courts of equity have been enlarged by this change in the law. Appellant claims that such jurisdiction has been narrowed by the code, because section 3366 limits the relief to the cases specified in title III. But section 3384 is a later section, and reverses the rule stated in section 3366; or it may be regarded as itself a specification under section 3366. At all events, there is no ground to claim that the power of the court to enforce specific performance has been narrowed by the Civil Code.

Without appealing to the code to show a change in the rules of equity upon the subject of specific performance, there can be no doubt of the right of the plaintiff.

The specific circumstances which authorize the court to give this relief are: 1. That the stock has no market or ascertainable value; and 2. Plaintiff purchased the stock for an investment—in other words, with a view to anticipated increase in value; and 3. That he cannot

purchase other shares in the corporation, because no holder will sell any.

In *Senter v. Davis*, 38 Cal. 450, the matter was discussed, and the reasoning found there fully sustains this view. In that case, however, relief was denied because it did not appear that the property had no market value.

The matter is elaborately considered in *Cushman v. Thayer Mfg. Co.*, 76 N. Y. 365, 32 Am. Rep. 315, where numerous authorities are cited. (See, also, *Johnson v. Brooks*, 93 N. Y. 342; *Adams v. Messinger*, 147 Mass. 185; 9 Am. St. Rep. 679.)

2. It is further contended that the court could not compel Woodward to convey his own stock in lieu of the certificate which he received from plaintiff.

The property assigned to Woodward was twenty shares of stock. There was no difference in the shares. In *Atkins v. Gamble*, 42 Cal. 86, 10 Am. Rep. 282, it was held that under precisely the same circumstances, the only right which the bailor had was to recover the precise number of shares. He cannot insist upon a return of the identical stock, for it is a matter of no consequence. There can be no *pretium affectionis* for the certificate.

The same rule must prevail here. Appellant has no cause to complain.

The propriety of the action of the court is, however, fully sustained by authority. (*Cushman v. Thayer Mfg. Co.*, *supra*; 1 Morawetz on Private Corporations, sec. 219; 1 Pomeroy's Equity Jurisprudence, sec. 164; *Johnson v. Brooks*, 93 N. Y. 342.)

I see nothing in the point that plaintiff made no investment because he borrowed from appellant, upon a pledge of this identical stock, the money with which he paid the subscription. He gave his note, and was personally bound for its payment.

The judgment is affirmed.

MCFARLAND, J., and HENSHAW, J., concurred.

[No. 15937. Department One.—December 31, 1895.]

**A. M. BROWN, APPELLANT, v. H. C. CAMPBELL ET AL., APPELLANTS. JOHN G. PRIEST, RESPONDENT.**

**CONFLICT OF JURISDICTION — PRIORITY — IDENTITY OF TRIBUNAL.**—The rule that the judgment of a court which first acquires jurisdiction of the subject matter of a cause of action and of the parties thereto, will prevail over the judgment of another court whose jurisdiction was subsequently acquired, rests upon comity and the necessity of avoiding a conflict in the execution of judgments rendered by independent courts of distinct or concurrent jurisdiction; but this rule has no application to a case where the actions are brought in the same court and the judgments are rendered by the same tribunal.

**ID.—SUPERIOR COURT OF SAN FRANCISCO—DEPARTMENTS—IDENTITY OF JURISDICTION.**—There is but one superior court in the city and county of San Francisco, and all of the actions brought in that court are within the same jurisdiction, and the entire procedure from the commencement of the action to the execution of the judgment is in one court; and the jurisdiction over a cause, after it has been assigned by the presiding judge to one of the judges of the other departments of the court, remains in the same court, and neither the judge to whom it has been assigned, nor the department over which he presides, has any jurisdiction distinct from that of the court in which the action is pending.

**ID.—DEFENSES—PENDENCY OF PRIOR ACTION—ESTOPPEL OF FORMER JUDGMENT—PLEADING.**—In an action brought in the superior court of the city and county of San Francisco, if the defense of a prior action pending in another department of the same court, for the same cause, or of the estoppel of a former judgment rendered therein, is not pleaded when such defense is available to the defendant, he cannot, after an adverse judgment, avail himself of such defense.

**ID.—ISSUE OF PRIOR ACTION PENDING—JUDGMENT—ABATEMENT.**—Upon a plea of a prior action pending for the same cause, if the issue is tried and found against the plaintiff the judgment of the court should be that the action should abate, and the rights of the parties must be determined by the judgment in the former action.

**ID.—PLEA OF FORMER JUDGMENT—TIME FOR APPEAL—PRACTICE—PLEADING.**—Where a judgment is ineffectual as evidenced under a plea of a former adjudication, until the time for an appeal therefrom has expired, the true course of the defendant in such case is to plead the pendency of the former action in abatement until the judgment therein becomes final, when the judgment may be pleaded in bar of the action by supplemental answer.

**ID.—EFFECT OF JUDGMENT IN PRIOR ACTION PENDING—CONTINUANCE — DISMISSAL OF SECOND ACTION.**—If a judgment rendered in a prior action for the same cause has not become final, the pendency of the prior action after judgment is a good ground for the continuance of the subsequent action until the final determination of the former action, or would be a sufficient basis for an order dismissing the subsequent action upon motion of plaintiff.

**ID.—DOUBLE JUDGMENT AGAINST STAKEHOLDERS—FAILURE TO SUSTAIN DEFENSE—STAY OF EXECUTION UPON SECOND JUDGMENT.**—Where stakeholders, instead of paying the money into court for purposes of interpleader, abandon their position as stakeholders and defend against the right of one of the parties to receive any of the money, they cannot claim the consideration due to a stakeholder, and if, in two separate actions against them, judgment is rendered in favor of each of the claimants of the money, in the absence of any plea of a prior action pending for the same cause, they are in the position of a litigant who has failed to sustain his defense, and cannot obtain an order in the second action setting aside the judgment or granting a perpetual stay of execution thereon on account of a former judgment in favor of the other claimant rendered in a prior action between the same parties.

**APPEAL** from an order of the Superior Court of the City and County of San Francisco denying a motion to vacate a judgment, and for a perpetual stay of execution thereupon. **WILLIAM T. WALLACE**, Judge.

The facts are stated in the opinion of the court.

*James A. Waymire, H. C. Campbell, W. T. Baggett, and R. Percy Wright*, for Appellants.

The court which first acquires jurisdiction of the subject matter and of the parties, retains it to the exclusion of all other courts until the complete determination of the controversy, and the judgment of such court, when final, is conclusive between the parties and upon all other tribunals as to that subject matter. (*Semple v. Hagar*, 27 Cal. 163; *Sharon v. Sharon*, 84 Cal. 430; *Parsons v. Lyman*, 5 Blatchf. 173; *Hines v. Rawson*, 40 Ga. 356; 2 Am. Rep. 581; *Peck v. Jenness*, 7 How. 621-25; *Withers v. Denmead*, 22 Md. 146; *Sharon v. Terry*, 13 Saw. 419; *Smith v. McIver*, 9 Wheat. 532-35; *Wallace v. McConnell*, 13 Pet. 146-51; *Mallett v. Dexter*, 1 Curt. 178, 179; *Greenwood v. Rector*, Hemp. 708, 709; *The Ship Robert Fulton*, 1 Paine, 626, 627; *Union Ins. Co. v. Chicago etc.* 10 Biss. 195-97; Freeman on Judgments, 4th ed., sec. 118.) The cause of action asserted in *Priest v. Brown et al.* was merged in the judgment in that case when it became final, and the validity of the deed from Joseph

Brown to A. M. Brown was then *res adjudicata*. (Black on Judgments, sec. 675; *Andrews v. Varrell*, 46 N. H. 18; *Estes v. Chicago etc. Ry. Co.* 72 Iowa, 235; Herman on Estoppel, secs. 99-102, 120.) There was no opportunity to plead the judgment in *Priest v. Brown et al.* in bar of the action of *Brown v. Campbell* until the judgment in the former case became final. (Code Civ. Proc., sec. 1049; *Harris v. Barnhart*, 97 Cal. 546; *Naftzger v. Gregg*, 99 Cal. 83; 37 Am. St. Rep. 23; *Estate of Blythe*, 99 Cal. 472.) A motion is the appropriate remedy under circumstances such as those disclosed in the case at bar. (1 Freeman on Judgments, 4th ed., sec. 95; *Imlay v. Carpentier*, 14 Cal. 177; *Baker v. Judges of Ulster*, 4 Johns. 191; *Wetmore v. Law*, 34 Barb. 517, 518; *Cooley v. Gregory*, 16 Wis. 305.)

*T. Z. Blakeman*, for Respondent.

A party is not concluded by a judgment in a prior suit where from the nature or course of the proceedings he could not avail himself of the same means of defense or of redress which are open to him in the second suit. (1 Greenleaf on Evidence, sec. 524.) The cause of action is said to be the same where the same evidence will support both actions. (2 Black on Judgments, sec. 726; *Taylor v. Castle*, 42 Cal. 370, 372; *Gray v. Dougherty*, 25 Cal. 266.) The true course of a defendant who desires to avail himself of a judgment in an action on appeal is to plead the pendency of the former action in abatement until the judgment therein becomes final. (*Harris v. Barnhart*, 97 Cal. 551; *Davis v. Perley*, 30 Cal. 636.)

HARRISON, J.—The case of *Priest v. Brown et al.*, in which Joseph Brown and A. M. Brown were two of the defendants, was commenced in the superior court for the city and county of San Francisco, April 13, 1887, and was tried in Department One of that court before the Hon. T. K. Wilson, and judgment was rendered by him in favor of the defendants, and was entered November 24, 1888. The action was brought for the purpose



of subjecting to sale, under the direction of the court, certain real property alleged to have been fraudulently conveyed by Joseph Brown to A. M. Brown, and the application of a portion of the proceeds thereof to the payment of a claim of the plaintiff against Joseph Brown. While that action was pending Henry C. Campbell and Thaddeus B. Kent, two of the appellants herein, who held the legal title to the property, sold the same, and A. M. Brown commenced the present action in the same court to recover from them two thousand five hundred and forty-nine dollars and fifty cents, the amount of certain surplus moneys in their hands, arising from the sale of said property. This cause was assigned to Department Six of that court. In their answer to the complaint Campbell and Kent alleged that Priest claimed the money, and asked that he be made a party defendant, and that thereupon they be permitted to pay the money into court, and be discharged of all liability therefor. Priest was thereupon made a party defendant to the action, and filed an answer to the complaint of the plaintiff, and also a cross-complaint, in each of which he alleged substantially the same facts as were alleged in the complaint in the action of *Priest v. Brown*. Thereafter the plaintiff united with the defendants Campbell and Kent in a motion to strike out this answer. This motion was granted May 9, 1889, and the case was afterward tried before the Hon. W. T. Wallace, who rendered judgment in favor of Priest, which was entered February 25, 1892. An appeal to this court was taken from each of these judgments, and the two appeals were heard together, and each of the judgments was affirmed December 30, 1893. (*Priest v. Brown*, 100 Cal. 626; *Brown v. Campbell*, 100 Cal. 635; 38 Am. St. Rep. 314.) Upon filing the *remittitur* in the superior court in the present case, the appellants moved that court for an order setting aside the judgment, or granting a perpetual stay of execution thereon. In support of the motion they presented to the court the records and papers on file in the two actions, and

urged as the grounds of the motion that, inasmuch as in the case of *Priest v. Brown et al.* judgment had been rendered in favor of A. M. Brown, the plaintiff herein upon the same cause of action that is presented in this suit, and had been affirmed by the court, that judgment had become the final determination of the rights of the parties, and was not impaired by the subsequent judgment rendered in this action. The motion was denied, and the present appeal is from that order.

The rule invoked by the appellants, that the judgment of that court which first acquires jurisdiction of the subject matter of a cause of action and of the parties thereto will prevail over the judgment of another court whose jurisdiction was subsequently acquired, has no application to the present case. That rule rests upon comity and the necessity of avoiding a conflict in the execution of judgments rendered by independent courts, either of distinct or concurrent jurisdiction. But the rule itself, as well as the reason for its exercise, has no existence in a case where the actions are brought in the same court, and the judgments are rendered by the same tribunal. There is but one superior court in the city and county of San Francisco, and all of the actions brought in that court are within the same jurisdiction. (*White v. Superior Court, ante*, p. 60.) The assignment of causes to different departments does not take place until after the court has acquired jurisdiction of the cause, and is made in order to expedite the business of the court, by apportioning them to the several judges for trial and judgment. The jurisdiction over a cause, after it has been assigned by the presiding judge to one of the other judges for trial, remains in the same court, and neither the judge to whom it has been assigned, nor the department over which he presides, has any jurisdiction over the cause distinct from that of the court in which the action is pending. The entire procedure from the commencement of the action to the execution of the judgment is in one court, and there is no opportunity for conflict of jurisdiction, either

in pronouncing a judgment or in its execution after it has been rendered. When, therefore, a suit is commenced in that court upon a cause of action which is then pending before it in another suit, or which has already been carried into judgment, the procedure to be observed is the same as if the two actions were in a court with but a single judge before whom all causes therein were to be tried. If the defense of a pending suit, or the estoppel of a former judgment, is not pleaded when such defense is available to the defendant, he cannot, after an adverse judgment, avail himself of this defense which he neglected to plead when he had an opportunity to do so, any more than he could avail himself of any other defense which he had omitted to plead.

When the present action was commenced, the action of *Priest v. Brown et al.* was pending in the same court, and had not been tried. The main issue in that action was whether Priest had the right to subject the lands described in the complaint to the payment of his claim against Joseph Brown. After Priest had been made a defendant in the present action, at the instance of the appellants Campbell and Kent, he filed an answer in which he pleaded the pendency of the former action, and the identity of the issues and parties thereto with those in the present action. There was thus presented to the court for determination the precise question involved in this motion, and, if this issue had been tried and found against the plaintiff, the judgment of the court would have been that the action should abate; and the rights of the parties would have been determined by the judgment in the former action. Instead of taking this course, the appellants asked the court, and the court, at their instance, struck this defense from the answer of Priest, and the cause was tried upon the same issues as were presented in the former action, without any objection to a re-examination of them by the court. It is too clear for argument that the appellants cannot, after an adverse judgment upon issues of their own selection and framing, interpose a defense to the en-

forcement of that judgment, which they had an opportunity to present for the purpose of defeating the respondent's claim, but which they industriously sought not to have presented to the court for its judgment thereon.

When this cause was here upon the former appeal, the appellants urged the reversal of the judgment because of the prior judgment in the case of *Priest v. Brown*, which they had pleaded as a bar to any further litigation of the issue then determined. In holding that this plea of a former judgment was unavailing, for the reason that the judgment had not become final, the court said: "But while the judgment in *Priest v. Brown et al.* was not for the reason stated a bar to the cause of action alleged in the cross-complaint, still the pendency of that action would have been a good ground for the continuance of this until the final determination of the former action, or would have been a sufficient basis for an order dismissing the present action upon motion of the plaintiff, notwithstanding the affirmative relief demanded by the defendant Priest in his cross-complaint, and the refusal of the court to have granted either of such motions would perhaps have been erroneous; but no such motion was made by the plaintiff, and the trial proceeded without objection, the plaintiff still insisting upon the judgment in *Priest v. Brown et al.* as an estoppel, and as ground for a judgment in his favor." In *Harris v. Barnhart*, 97 Cal. 546, it was said: "Where a judgment is ineffectual as evidence in a plea of former adjudication until the time for an appeal therefrom has expired, the true course of a defendant in such a case would be to plead the pendency of the former action in abatement, until the judgment therein became final, when a supplemental answer averring the proper facts in bar of the action would be in order."

The appellants, Campbell and Kent, urge that, as they are mere stakeholders, they are liable to suffer by reason of the different judgments in the two causes. If, however, they had retained their position as stake-

holders, and had complied with the offer made in their original answer to the complaint of the plaintiff by paying the money into court, they would then have been entitled to a judgment discharging them from further liability therefor, but, after Priest had been brought into the action at their instance, they abandoned their position as stakeholders, and defended against his right to receive any of the money. Having thus assumed a position antagonistic to Priest, they cannot claim any of the consideration due to a stakeholder, but are in the position of any other litigant who has failed to sustain his defense.

The order is affirmed.

GAROUTTE, J., and VAN FLEET, J., concurred.

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[Crim. No. 81. In Bank.—January 2, 1896.]

**EX PARTE WILLIAM E. NICHOLS, ON HABEAS CORPUS.**

**CONSTITUTIONAL LAW—PRESTON SCHOOL OF INDUSTRY—DETENTION AND EDUCATION OF MINOR OFFENDERS.**—The act of March 11, 1889, establishing the Preston School of Industry is constitutional, the legislature having the power to provide for the detention and education of minor offenders; and the fact that the term of detention is made greater by the judgment of the court than the term of the longest imprisonment in the county jail allowed for the same offense does not render the act invalid; nor can it be said that the punishment inflicted is greater than can be put upon an adult for the same offense, the object of the act being not punishment, but reformation, discipline, and education, and to afford the juvenile offender the opportunity and instruction to learn a trade, and to qualify himself for the duties of citizenship.

**ID.—HABEAS CORPUS—COMMITMENT FOR PETIT LARCENY—JURISDICTION OF JUSTICE'S COURT—FELONY—TRANSFER OF BOYS FROM STATE PRISON.**—A juvenile offender sentenced by the justice's court for petit larceny to the Preston School of Industry until he is twenty-one years of age is not punished as for a felony beyond the jurisdiction of the justice's court; and the fact that the act provides that any boy under eighteen years of age who is serving a sentence in any state prison, who shall be deemed a fit subject for training in said school, may, upon the recommendation of the board of prison directors and the approval of the governor, be

transferred to said school, and, when honorably discharged therefrom, shall be entitled to such benefits and immunities as are provided for other inmates thereof, does not turn the school into a state prison, but such transfer is in effect a commutation by the governor, and an offender sentenced by the justice's court cannot be released upon *habeas corpus* upon the ground that such transfer may be made from the state prison.

HEARING in the Supreme Court upon writ of *habeas corpus*.

The facts are stated in the opinion of the court.

*N. S. Wirt*, for Petitioner.

Any law extending the jurisdiction of a court of limited jurisdiction out of its territory is unconstitutional. (*State v. Shropshire*, 4 Neb. 412.) The maximum term of imprisonment for petit larceny and all other misdemeanors not specially provided for is six months. (Pen. Code, sec. 490.) No state shall deny to any person within its jurisdiction the equal protection of the laws. (U. S. Const., art. XIV, sec. 1; Const., art. 1, sec. 21; *Ex parte Virginia*, 100 U. S. 339-47; *Missouri v. Lewis*, 101 U. S. 30; *Yick Wo v. Hopkins*, 118 U. S. 369; *In re Converse*, 137 U. S. 630-32.) The Preston school is not the place allowed by law to detain the defendant. (Const., art. I, sec. 11; Pen. Code, sec. 1487.) The judgment in this case, which is in excess of the time fixed by law, is void. (*Ex parte Bulger*, 60 Cal. 438; *In re Graham*, 138 U. S. 461.) The sentence in this case should have been to the county jail. (*Ex parte Bernert*, 62 Cal. 524; *In re Mills*, 135 U. S. 263; *Ex parte Lange*, 18 Wall. 163.)

*Charles H. Jackson*, Deputy Attorney General, contra.

McFARLAND, J.—The petitioner, William Nichols, asks, on a writ of *habeas corpus*, to be discharged from the custody of Carl Bank, superintendent of the Preston School of Industry, situated in Amador county. He was convicted in a justice's court of petit larceny, and, being under the age of eighteen years, the justice ad-

judged that he was a fit subject for commitment to said school, suspended judgment, and committed him to said school until he should be twenty-one years old, unless sooner legally discharged. The commitment was approved by the superior judge of the county, as provided by section 16 of an act entitled "An act to establish a school of industry," approved March 11, 1889, under which act the proceedings here complained of were had. (Stats. 1889, pp. 100-06.)

Petitioner assails the constitutionality of said statute mainly upon the grounds that it is unequal in its operation, because under it an adult can be punished for petit larceny by imprisonment in the county jail for only six months, while a minor may, for the same offense, be sent to said school for a much longer period; that a justice's court has no jurisdiction in such a case to impose imprisonment for more than six months; that the statute is a special law regulating jurisdiction of a justice's court, etc. These and similar objections to the statute are answered against petitioner's contention by the case of *Ex parte Liddell*, 93 Cal. 633. That case involved the validity of the act by which the Whittier Reform School was established (Stats. 1889, p. 111), and its provisions, so far as these questions are concerned, are similar to those of the statute here under review. In answer to similar objections there made, this court, in Bank, through Patterson, J., said: "There can be no question as to the power of the legislature to provide for the detention and education of juvenile offenders, as it has done in this act; and the provisions of the act are not obnoxious to the criticism that it prescribes unjust or unequal penalties. It is true the term of detention at the reform school may be made greater by the judgment of the court than the term of the imprisonment in the county jail or in the state prison for the same offense would be; but it cannot be said that the punishment inflicted is greater than could be put upon an adult for the same offense. The object of the act is not punishment, but reformation, discipline, and education. (Pen.

Code, sec. 12.) . While detained for a longer period, perhaps, than he would be if sent to state prison or the county jail, the conditions surrounding the child are vastly different. He is given the opportunity and instruction to learn a trade and qualify himself for the duties of citizenship, so that at the end of his term he will go out prepared to take care of himself and those dependent upon him without the odium which attaches to an ex-convict. There is no doubt of the power of the state to make and enforce provisions for the compulsory education of all children within the state; and it is equally clear that the state may arrest the downward tendency of those who have offended against its laws and manifested a disposition to follow a criminal career, by placing them in an institution where they will receive the care, education, and discipline necessary to prepare them for honorable citizenship."

It is contended that under a certain provision concerning the Preston school which is not contained in the act creating the Whittier school, sending the petitioner to the latter school was in fact sending him to a state prison, and thus making a felon of him, which the justice's court had no jurisdiction to do. But this contention cannot be maintained. The provision in question is that any boy under eighteen years old who is serving a sentence in any state prison, and who shall be deemed a fit subject for training in said school, may, upon the recommendation of the board of prison directors, and *the approval of the governor*, be transferred to said school, and that said boy, "when honorably discharged from said school, as hereinbefore provided, shall be entitled to such benefits and immunities as are provided for the other inmates of the institution." Taking a boy *out* of the state prison and putting him in the school, with the "benefits and immunities" of its other inmates, is certainly not turning the reform school into a state prison. It is, in fact, a commutation by the governor; and the boys thus sent to the school, if honorably discharged, are "released from all penalties and *disabil-*



*itics* resulting from the offenses or crimes for which they are committed."

The petitioner is remanded and the writ dismissed.

GAROUTTE, J., VAN FLEET, J., HARRISON, J., BEATTY, C. J., TEMPLE, J., and HENSHAW, J., concurred.

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[L. A. No. 91. In Bank.—January 8, 1896.]

DALTON WHEELER, APPELLANT, v. JOHN A. DONNELL, RESPONDENT.

**CRIMINAL LAW—MISDEMEANOR IN OFFICE—APPELLATE JURISDICTION—DISMISSAL.**—A proceeding by accusation for alleged misdemeanors in office, under section 772 of the Penal Code, is a criminal proceeding not prosecuted by information or indictment, and is not within the appellate jurisdiction of the supreme court, and an appeal from the judgment rendered therein will be dismissed.

**ID.—REMOVAL FROM OFFICE—FINE—JUDGMENT IN FAVOR OF INFORMER.** If the charges are substantiated, the fact that in such proceeding the court must enter a decree that the party accused be deprived of his office, and also enter a judgment in favor of the informer for the sum of five hundred dollars, does not make the demand a case at law for an amount greater than three hundred dollars within the appellate jurisdiction of the supreme court; but such judgment is for a fine, and the fact that it is payable to the informer, rather than into the county treasury, is wholly immaterial, and the provision therefor is purely incidental to the main purpose of the act, which is to secure the removal of the officer guilty of unlawful conduct.

**ID.—QUO WARRANTO—TITLE TO OFFICE.**—An accusation for misdemeanor in office is in no sense a proceeding in the nature of *quo warranto*, nor is the title of the office in issue therein.

**APPEAL** from a judgment of the Superior Court of the county of Los Angeles and from an order denying a new trial. WALTER VAN DYKE, Judge.

The facts are stated in the opinion of the court.

*R. H. Chapman*, and *W. T. Kendrick*, for Appellant.

*Ben. Goodrich*, and *Allen & Flint*, for Respondent.

GAROUTTE, J.—This is a proceeding brought against J. A. Donnell, district attorney of Los Angeles county,

by accusation, under the provisions of section 772 of the Penal Code, alleging misdemeanors in office. The accusation was tried upon the complaint and answer; and judgment was rendered upon the merits, exonerating the accused and dismissing the complaint. This is an appeal by the accuser, Wheeler, from said judgment. Respondent has moved to dismiss the appeal upon the ground that no appellate jurisdiction in such cases is vested in this court; and this is the only point here involved.

In *In re Curtis*, 108 Cal. 661, the question here involved was directly presented, and this court dismissed the appeal for lack of jurisdiction to entertain it. The reasoning upon which the conclusion was there arrived at is entirely satisfactory to us, and it would hardly seem that further consideration of the subject is necessary. That decision is based upon the broad proposition that the proceeding is a criminal one, not prosecuted by information or indictment, and, therefore, without the appellate jurisdiction of this court. That this proceeding is a criminal one, and in its nature a prosecution for crime, is evident by every section of the Penal Code found in the chapter where this accusation is authorized. In addition to this, section 15 of the Penal Code declares: "A crime or public offense is an act committed or omitted in violation of the law forbidding or commanding it, and to which is annexed upon conviction either of the following punishments: . . . 4. Removal from office."

In a case like the present one, if the charges are substantiated, the court must enter a decree that the party accused be deprived of his office, and also enter a judgment in favor of the informer for the sum of five hundred dollars. It is now sought to avoid the effect of the rule declared in the Curtis case by claiming the present proceeding to be a case at law in which the demand, exclusive of interest, amounts to three hundred dollars; conceding a demand is here involved amounting to three hundred dollars, such fact of itself is not sufficient

to vest this court with jurisdiction. A demand in that amount must be in a "case at law," and here we have no such case. There are many misdemeanors punishable by imprisonment and fine of five hundred dollars, and it might, upon similar lines of reasoning, be urged that there was a money demand of five hundred dollars involved in such cases, and appellate jurisdiction for that reason be vested in this court; but in *People v. Johnson*, 30 Cal. 98, this court, in construing the provision of the constitution as to its appellate jurisdiction, said: "In view of this clear and precise division of the subject matter, aside from the ordinary import of the words 'cases at law,' it is clear that those words only refer to civil, as distinguished from criminal, cases. Equity cases are first provided for, then civil cases at law, then probate cases, and lastly criminal cases."

This accusation charges a misfeasance in office, and the penalty therefor is removal from such office and fine. As a matter of policy the law declares that the sum of five hundred dollars, which is nothing more or less than a fine, shall go to the informer; and that this money goes to the informer rather than into the county treasury is wholly immaterial. Again, the main purpose of the act is to secure the removal of the officer guilty of unlawful conduct, and the money judgment provided for is purely incidental to that purpose. (*Smith v. Ling*, 68 Cal. 324.) This is even more fully apparent when we consider that an accusation presented by the grand jury is not followed by any money judgment in case a conviction results; and, also, from the further fact that the entire sum goes into the pockets of the informer.

In *Woods v. Varnum*, 85 Cal. 639, it is held that the accused is not entitled to a jury trial. If the case was one at law, involving more than three hundred dollars, such a judgment could not stand. Aside from the money judgment provided by the section, the proceeding has no single element of a "case at law." It is in no sense a proceeding in the nature of *quo warranto*, as

was held to be the nature of the action in *People ex rel. Davidson v. Perry*, 79 Cal. 105. The subject of litigation in that case was title to the office. In all essentials that was a case at law. A question of conflicting claims to an office was there presented, and usurpation was charged. There title was denied; here title is admitted. It was not held in that case that by reason of a five thousand dollar fine being authorized by the statute, this court had appellate jurisdiction; but it was held that a money demand exceeding three hundred dollars being involved, and the action being substantially a *quo warranto* proceeding, and in its nature a case at law, therefore appellate jurisdiction was vested in this court.

For the foregoing reasons the appeal is dismissed.

HARRISON, J., VAN FLEET, J., MCFARLAND, J., and HENSHAW, J., concurred.

BEATTY, C. J., and TEMPLE, J., dissented.

Hearing in Bank denied.

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[No. 18280. Department Two.—January 10, 1896.]

PARKE & LACY COMPANY, APPELLANT, v. WHITE RIVER LUMBER COMPANY ET AL., DEFENDANTS.  
OSGOOD HILTON, RESPONDENT.

MORTGAGE FOR DEBT OF ANOTHER—SURETYSHIP—DISCHARGE OF LIEN—CHANGE OF PRINCIPAL CONTRACT.—When property of any kind is mortgaged or pledged by the owner to answer for the default or miscarriage of another person, such property occupies the position of a surety or guarantor, and anything which will discharge an individual surety or guarantor who is personally liable will, under similar circumstances, discharge such property; and the mortgaged property is exonerated from all liability as surety if, after the execution of the mortgage, the principal contract between the debtor and creditor is altered in any material particular without the consent of the mortgagor.

Id.—RECITALS IN MORTGAGE—ESTOPPEL—REFERENCE TO LEASE—CONDITIONAL SALE—ALTERATION OF TERMS.—A recital in a mortgage executed by a third person to secure payments under a lease

which operates in law as a conditional sale, that the principal debtor is justly indebted to the creditor for the full sum agreed to be paid as rent for certain machinery in accordance with the terms of the lease, does not estop the mortgagor from showing that the terms of the lease were afterward altered by the parties, and that no indebtedness ever accrued in accordance with its original terms.

**Id.**—NOTE SECURED BY MORTGAGE—FORECLOSURE.—Where the mortgage, in addition to being given as security for the lease, is also given to secure the payment of a promissory note which is distinct from the lease or conditional sale, and which has not been altered in any respect, the mortgage should be foreclosed therefor, though discharged as to the lease by the change of its terms.

**Id.**—DISCHARGE OF SURETY IN PART.—Where a surety is bound by one bond for the performance by the principal of two distinct things, and the contract is varied as to one of the things to be performed, the surety is discharged as to the matter concerning which the contract has been changed, but is not discharged from that as to which it has not been changed.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. A. A. SANDERSON, Judge.

The facts are stated in the opinion.

H. A. Powell, for Appellant.

The meaning of words and their legal effect is not affected by the fact that the party sought to be charged is principal, surety, or guarantor. (See 1 Brandt on Suretyship, 2d ed., sec. 92.) No strained construction should be given to the obligation of sureties, but one which accords with a rational interpretation of the language of their agreements. (*People v. Breyfogle*, 17 Cal. 509.) The principal has the right to do anything which on a fair construction of the contract was contemplated by the parties. The surety cannot complain unless some act is done which injures him. (5 Wait's Actions and Defenses, 193; *Smith v. Addison*, 5 Cranch C. C. 623; *Humphreys v. Crane*, 5 Cal. 173; *Ward v. Hackett*, 30 Minn. 150; 44 Am. Rep. 187; Civ. Code, secs. 2336, 2809, 2819, 2840.) Where the great current of the evidence is against the findings of the court below, and the conviction that they are wrong cannot be escaped, the supreme court should not be deterred from setting them

aside. (*Field v. Shorb*, 99 Cal. 661.) Sureties are estopped to deny the facts recited in the obligation signed by them, and this whether the recitals are true or false in fact. (1 Brandt on Suretyship, sec. 42, et seq; *Tartar v. Hall*, 3 Cal. 263; *McMillan v. Dana*, 18 Cal. 339; *Smith v. Fargo*, 57 Cal. 157; *Thomas v. Burrus*, 23 Miss. 550; 57 Am. Dec. 154; *Kiessig v. Allspaugh*, 91 Cal. 234.) The decree should have been at least for the amount of the money loaned as evidenced by the promissory note. Where the contract is for the conduct of the principal in two distinct employments, an alteration in one does not discharge the surety as to the other. (*Skillett v. Fletcher*, L. R. 1 Com. P. 217; L. R. 2 Com. P. 469; *Croydon v. Dickinson*, L. R. 1 C. P. Div. 709; 2 Brandt on Suretyship, 398; *Harrison v. Seymour*, L. R., 1 Com. P. 518; *Farmers' etc. Bank v. Kercheval*, 2 Mich. 504.)

*Garber, Boalt & Bishop*, for Respondent.

Where a person pledges or mortgages his own property to secure the debt of another, the property so pledged or mortgaged occupies the position of a surety. (24 Am. & Eng. Ency. of Law, 722.) Where an original contract is made the basis of contract of suretyship, any alteration whatever of the terms of the original contract will discharge the surety, even when such alteration is actually beneficial to him. (Civ. Code, secs. 2819, 2836, 2840; Baylies on Sureties, 260; *Miller v. Stewart*, 9 Wheat. 680; *United States v. Tillotson*, 1 Paine, 305; *Ludlow v. Simond*, 2 Caines Cas. 1; 2 Am. Dec. 291; *Samuel v. Howarth*, 3 Mer. 272; *Polak v. Everett*, L. R. 1 Q. B. Div. 669; *Rees v. Berrington*, 2 Ves. 539; *Grant v. Smith*, 46 N. Y. 93; *People v. Vilas*, 36 N. Y. 460; 93 Am. Dec. 520; *Vose v. Florida R. R. Co.*, 50 N. Y. 369; *Paine v. Jones*, 76 N. Y. 278; *Ide v. Churchill*, 14 Ohio St. 384; *Gahn v. Niemcewicz*, 11 Wend. 317; Burge on Suretyship, 214, 215; *Pendergast v. Meserve*, 22 N. H. 109; 53 Am. Dec. 234, and cases there cited.) The recitals in the mortgage show that the lease is a part of the mortgage, and, as both instruments were exe-

cuted at the same time, they are to be read and construed together with regard to the recitals. (*Strong v. Barnes*, 11 Vt. 221; 34 Am. Dec. 684; *Howell v. Howell*, 7 Ired. 491; 47 Am. Dec. 335.) Recitals of indebtedness do not estop the party making them from disputing and disproving them. (Bigelow on Estoppels, 2d ed., 281, et seq., 438, et seq., 494, and cases there cited; *M'Crea v. Purmort*, 16 Wend. 460; 30 Am. Dec. 103; *Beach v. Packard*, 10 Vt. 96; 33 Am. Dec. 185; *Swafford v. Whipple*, 3 G. Greene, 261; 54 Am. Dec. 498, and notes thereto.) The recitals in a deed operate as an estoppel only where declarations of the grantor to the same effect, made at the time of the execution of the deed, would be evidence against him and those claiming under him. (*Joeckel v. Easton*, 11 Mo. 118; 47 Am. Dec. 142.)

VANCLIEF, C.—On June 12, 1889, the respondent, Hilton, executed to appellant a mortgage on real estate to secure payment of a promissory note of the same date made jointly by the White River Lumber Company and W. D. Parsons, for \$650 and interest, payable to the order of plaintiff nine months after date; and also to secure the further sum of \$3,064, payable to plaintiff according to the terms of a written agreement of same date, attached to and made a part of the mortgage, of which the following is a copy:

"The Parke & Lacy Company of San Francisco, Cal., lessors, hereby lease unto the White River Lumber Company and Warren D. Parson of Tulare county, Cal., lessees, the following property for the period of nine (9) months, from the 15th day of June, 1889, to wit:

"One (1) 54 inch x 16 feet horizontal stationary tubular boiler, No. 3,155, with fittings (T. M. Nagle's make).

"One (1) 16 inch x 20 inch Phoenix engine, No. 674, with a Gardner governor.

"One (1) 11 foot x 16½ inch pulley, made in halves of suitable weight.

"One (1) No. 3 Valley bucket pump, and merchandise described in the list attached hereto.

"Said property is to be used only at Arbor Vitæ, Tulare county, State of California, and said lessees are to pay to said lessors, at San Francisco, for the use of said property the sum of three thousand and sixty-four (\$3,064) dollars, payable as follows: All on the 15th day of March, A. D. 1890.

"Said lessees agree that they will pay the rent at the times and in the manner aforesaid; that they will not permit said property, nor any part thereof, to be affixed to real estate, nor removal from where it is to be used aforesaid, nor deliver the same to any one, nor suffer it to be taken away by any one, except lessors, nor in any manner transfer, or attempt to transfer, this lease, or any interest therein or in said property, without the written consent of lessors; that they will keep said property in good condition and repair, and pay all expenses relating to said property hereafter incurred, including transportation and insurance thereof, in the name of lessors, and all damages to said property suffered by lessors. It is further agreed that time is of the essence of this agreement, and that upon the failure of the lessee strictly to keep and perform any of the covenants or provisions hereof by them agreed to be performed, then and thereupon without any notice this instrument shall be deemed to be cancelled and of no further effect as against lessors, and all right and interest of lessee in or to said property shall cease, and all rent by lessee theretofore paid shall belong to lessors as full payment for the prior use of said property, and lessors shall be entitled to take into their possession all said property.

"Said lessors further agree that upon strict performance by lessee with all the foregoing covenants and provisions by them to be kept and performed, they shall then (but not otherwise) have the right to purchase said property by the prompt payment to the lessors of



the sum of three thousand and sixty-four (\$3,064) dollars.

"Witness the hands and seals of the parties hereto, this 12th day of June, 1889.

"[Signed] PARKE & LACY COMPANY,

"[Seal] B. T. Lacy, Pres.

WHITE RIVER LUMBER COMPANY,

"[Seal] By W. D. Parson, Pres.

W. D. PARSON.

"Witness: Osgood Hilton, W. F. Aldrich."

The conditions of the mortgage are that if default be made in the payment of said sums of money or any part thereof as provided in said note or agreement, the mortgagee may sell the mortgaged property and apply the proceeds, etc.

The mortgagor, Hilton, was not interested in the transactions between plaintiff and the other defendants, but executed the mortgage merely for the accommodation of the White River Lumber Company and Parsons, to whom he or his mortgaged property stands in the relation of mere surety, of which the mortgagee had notice at the time the mortgage was executed; and it is not disputed that he is entitled to all the rights and favor accorded by law to a surety. That is to say: "When property of any kind is mortgaged or pledged by the owner to answer for the default or miscarriage of another person, such property occupies the position of a surety or guarantor, and anything which would discharge an individual surety or guarantor who was personally liable will, under similar circumstances, discharge such property." (Brandt on Suretyship, sec. 34, et seq.)

This action was commenced February 7, 1891, to recover from the White River Lumber Company and W. D. Parson the sum of \$650 and interest alleged to be due on said promissory note, and the further sum of \$3,064 and interest alleged to be due on said written agreement, and also to foreclose the Hilton mortgage.

The defendants, White River Lumber Company and W. D. Parson, having failed to answer the complaint, a personal money judgment was rendered against them by default for the full amount demanded.

The material substance of the very verbose separate answer of the defendant Hilton is that, without his consent, said written agreement was altered materially, after the execution of the mortgage, by a verbal agreement between plaintiff and the other defendants, at the instance and request of plaintiff; and that the agreement as written was never substantially performed on his part by the plaintiff. The alleged alterations of the contract consisted in substituting for the "Gardner governor" and the "11 foot x 16½ inch pulley, made in halves of suitable weight," an inferior, defective, unsafe governor, known as a "Waters governor," and an inferior, defective pulley, smaller in size than that described in the written contract, and of insufficient weight. Besides the above, Hilton's answer contained a denial of the alleged indebtedness of the White River Lumber Company and Parson to the plaintiff.

The court below found in favor of the defendant Hilton on all the issues of fact; and, as conclusions of law, found that the defendant Hilton and the mortgaged property had been exonerated and discharged from all liability on the mortgage, and that the mortgage should be cancelled of record; and thereupon judgment was rendered accordingly. From this judgment and from an order denying his motion for a new trial the plaintiff has appealed.

The identical written contract hereinabove set out was construed by this court in the case of *Parke etc. Co. v. White River Lumber Co.*, 101 Cal. 37, and held not to be a lease, but a sale, either absolute or conditional. Although that decision is not the law of this case, the law announced therein is applicable to the construction of the contract, unless the construction may be aided and changed in this case by circumstances different from those appearing in that; but I perceive no difference af-

fecting the construction of the contract. But the construction given in that case can be applied in this case only to the extent that the contract is not a lease, since that *decision* goes only to that extent.

By whatever name the contract may be properly designated, or however classified, it was wholly executory by both parties thereto, the promise of each party being the only consideration for the promise of the other; and the first act to be performed—the delivery of the property described to the White River Lumber Company and Parson (miscalled lessees)—was to be performed by the plaintiff. The defendant Hilton mortgaged his property to secure performance, on the part of the White River Lumber Company and Parson, of this contract, and not to secure their performance of any other or materially different contract. If, therefore, the contract was altered by the parties thereto in any material particular after the execution of Hilton's mortgage, without his consent, the mortgaged property was thereby exonerated from all liability as security. (Civ. Code, secs. 2819, 2844; Brandt on Suretyship, secs. 397, 399, and cases there cited, especially *Bragg v. Shain*, 49 Cal. 131; *Truckee Lodge v. Wood*, 14 Nev. 293; *United States v. Corwine*, 1 Bond, 339.)

The court below found that the contract was materially altered as alleged in Hilton's answer, and without his consent, and this finding is justified by the evidence. The only conflict of the evidence applicable to this finding is found in that part of it relating to the question whether Hilton consented to the alteration; and, as to this, the conflict is substantial to a degree which precludes this court from disturbing the finding on the ground that it is not justified by the evidence, even though it should seem from the transcript of the evidence that a preponderance thereof is against the finding.

It is contended by appellant, however, that respondent is estopped from denying the recital in the mortgage that the lumber company and Parson "*are justly*

*indebted*" to appellant in the sum of \$3,064 as rent on machinery.

But such is not the recital. It is recited in the mortgage that the White River Lumber Company and Parson are justly indebted to the Parke & Lacy Company in the sum of \$650 on a certain promissory note (setting out a copy of the note); "and in the further sum of \$3,064, agreed to be paid as rent by said White River Lumber Company and Warren D. Parson to said Parke & Lacy Co. for the boiler, engine, and other machinery, in accordance with the lease this day executed, of which a copy is attached hereto and made a part hereof." The whole lease, as well as the note, must be read as a part of the recitals; and when so read will not estop Hilton from alleging that the lease was altered by the parties thereto without his consent after the execution of the mortgage, and that the covenants therein on the part of the plaintiff were never performed; and, consequently, that no indebtedness of the lumber company and Parson to plaintiff ever accrued "*in accordance with the lease.*"

The lease, being the principal part of the recitals, shows that the indebtedness referred to did not exist at the date of the recital, and could be only such as might thereafter accrue in accordance with its terms. Therefore, the averments that the lease was afterward altered, and that no indebtedness ever accrued *in accordance with its original terms*, are nowise inconsistent with the recitals in the mortgage.

I conclude that, as to the alleged indebtedness of \$3,064 founded upon the written agreement called a lease, a foreclosure of the Hilton mortgage was properly denied by the trial court. But I think the court erred in denying a foreclosure of the mortgage as a valid security for the payment of the promissory note for the sum of \$650, and the conventional interest thereon. That note is entirely distinct from the so-called lease, and there is no pretense that it has been altered in any respect. It appears that the consideration for it was a

loan by plaintiff of \$650, and that no part of the principal or interest had been paid when judgment was rendered against the other defendants. "Where a surety is bound by one bond for the performance by the principal of two distinct things, and the contract is varied as to one of the things to be performed, the surety is discharged as to the matter concerning which the contract has been changed, but is not discharged from that as to which it has not been changed." (Brandt on Suretyship, sec. 398, and cases there cited.)

I think the cause should be remanded, with instruction to modify the judgment according to this opinion.

BRITT, C., and SEARLS, C., concurred.

For the reasons stated in the foregoing opinion the cause is remanded and the court below is instructed to modify the judgment in accordance with said opinion.

MCFARLAND, J., HENSHAW, J., TEMPLE, J.

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[L. A. No. 89. Department Two.—January 10, 1896.]

**O. H. KIEFER, APPELLANT, v. E. LAVENTHAL ET AL.,  
RESPONDENTS.**

**SALE OF LIQUOR SALOON.—PAYMENT UPON PROCUREMENT OF LICENSE.—RECOVERY OF DEPOSIT.—PLEADING.**—Where personal property, consisting of all of the goods owned by the vendor in a retail liquor saloon, is sold for an agreed price, and as a further and separate agreement between the parties, the purchaser agrees to deposit with third parties an additional sum to be paid to the vendor upon the procurement of the right to sell and carry on a retail liquor business within the saloon, a complaint by the assignee of the vendor to recover the amount of the deposit is insufficient if it does not aver that the vendee procured the right to carry on the business, or could carry on the business without the procurement of the license, or that by his own neglect or default he had failed to secure the privilege.

**1d.—CONSTRUCTION OF CONTRACT.—CONDITION AS TO OBTAINING LICENSE.**—Such contract of sale is to be construed as an agreement to pay a fixed price for the personal property owned by the vendor in the saloon, and to pay the additional sum when and if the vendee obtained a license to conduct the business; and if he succeeded, his liability was complete, but if he failed, then he owned the property for which he had paid the price, and the transaction was at an end.

APPEAL from a judgment of the Superior Court of Los Angeles County. LUCIEN SHAW, Judge.

The facts are stated in the opinion of the court.

*King & Harmon*, for Appellant.

*John W. Mitchell*, for Defendant Tappeiner.

*Graff & Latham*, for Respondents Laventhal.

HENSHAW, J.—Appeal from the judgment entered after demurrer sustained to plaintiff's second amended complaint; plaintiff refusing further to amend.

The facts pleaded are that Brown and Beaslin entered into an agreement (set forth in full in the complaint) by which Brown sold to Beaslin, for the sum of sixty dollars to him paid, certain personal property. This property consisted of "all of the goods in and owned by me in my place of business in the town of Azuza"—a retail liquor saloon.

"As a further and separate agreement between the parties," Beaslin agreed to deposit with the firm of Laventhal & Sons (defendants herein) three hundred dollars, "to be paid to the party of the first part upon the procurement of the right to sell and carry on the business at the place above named; that is, the retail or liquor business within the same."

Beaslin deposited the money with Laventhal & Sons, who hold it. Brown assigned his interest and rights "as per agreement" to Kiefer; Kiefer, after demand upon Laventhal & Sons, commenced this action to obtain the three hundred dollars, making Tappeiner, who claimed by assignment from Beaslin, one of the defendants.

The complaint nowhere avers that Beaslin procured the right to carry on the business of retail liquor dealer, or that he could carry on the business without procurement of a right (presumably a license), or that by his own neglect or default he had failed to secure the privilege.

These averments lay at the foundation of plaintiff's right of action, and should have been alleged in one or another of the modes indicated. (*Lower v. Winters*, 7 Cow. 263.)

From the agreement alone it may reasonably be inferred that Beaslin paid Brown sixty dollars for such personal property as Brown owned in the saloon, agreeing to pay him three hundred dollars more when and if he obtained a license to conduct the business. If he succeeded, his liability to pay was complete. If he failed, then he owned the property for which he had paid sixty dollars, and the transaction was at an end.

Judgment affirmed.

McFARLAND, J., and TEMPLE, J., concurred.

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[No. 15464. In Bank.—January 10, 1896.]

DAVID T. PIERCE ET AL., APPELLANTS, v. H. H. BIRKHOLM ET AL., RESPONDENTS.

**APPEAL—ORDER GRANTING NEW TRIAL—EFFECT UPON JUDGMENT—DISMISSAL.**—Although a valid and subsisting order granting a new trial, which remains in full force and effect, operates to set aside the findings and judgment, yet where an appeal is taken from the order granting a new trial, it suspends the operation of the order, and pending such appeal the judgment remains subsisting for the purposes of an appeal therefrom, as if no order for a new trial had been made, and an appeal from the judgment cannot be dismissed upon the ground that it was vacated by the order granting a new trial.

**ID.—EFFECT OF REVERSAL OF ORDER.**—The reversal of an order granting a new trial leaves the verdict and judgment standing.

**MOTION** to dismiss an appeal from a judgment of the Superior Court of the City and County of San Francisco. WILLIAM T. WALLACE, Judge.

The facts are stated in the opinion of the court.

*William H. Jordan*, for Appellants.

A final judgment and an appealable order determining the merits of the matter in dispute are synonymous

terms, so far as the rights of the parties before this court are concerned. (*Belt v. Davis*, 1 Cal. 136; *Dowling v. Polack*, 18 Cal. 626; *Sacramento etc. R. R. Co. v. Harlan*, 24 Cal. 338; *Hills v. Sherwood*, 33 Cal. 478; *Phillips v. Pease*, 39 Cal. 584; see, also, Code Civ. Proc., sec. 577.) The appeal from the order granting a new trial had the effect of suspending all proceedings in the court below until the appeal was disposed of. (*Thornton v. Mahoney*, 24 Cal. 569; *People v. Frisbie*, 26 Cal. 139; *McGarrahan v. Maxwell*, 28 Cal. 92; *Murray v. Green*, 64 Cal. 369; *Harris v. Barnhart*, 97 Cal. 550; *Ford v. Thompson*, 19 Cal. 119.) The judgment of the lower court is not annulled by the appeal from the order. (*Estate of Crozier*, 65 Cal. 333.) The reversal of an order denying a new trial reverses the judgment, but the reversal of an order granting a new trial leaves the verdict and judgment standing. (Hayne on New Trial and Appeal, sec. 299.)

*W. S. Goodfellow*, for Respondents.

An order granting a new trial operates to vacate the judgment. (*Walden v. Murdock*, 23 Cal. 549; 83 Am. Dec. 135; *Thompson v. Smith*, 28 Cal. 528, 534; *Kower v. Gluck*, 33 Cal. 401; *Wittenbrock v. Bellmer*, 62 Cal. 558; *Wheeler v. Kassabaum*, 76 Cal. 90; *Brown v. Plumber*, 70 Cal. 337; *Bronner v. Wetzlar*, 55 Cal. 419, 420; 2 Encyclopedia of Pleading and Practice, 323-25; *Rogers v. Hatch*, 8 Nev. 35; *Railway Co. v. Twombly*, 100 U. S. 81.)

VAN FLEET, J.—Motion to dismiss an appeal.

Judgment was entered in the action in the court below in favor of defendants on August 15, 1892, but subsequently, on August 26, 1892, the court, on motion of plaintiffs, made an order granting a new trial. From the order granting a new trial defendants, on October 24, 1892, appealed to this court. After the taking of the appeal from said order, the plaintiffs, on May 10, 1893, took an appeal from the judgment.

We are asked by the defendants to dismiss the appeal



from the judgment, upon the ground, as contended, that the effect of the order granting defendants a new trial was to vacate and set aside the judgment, and that, consequently, when the appeal from the latter was taken, it had ceased to have any existence, and there was no judgment to appeal from. This view cannot, in our judgment, be sustained for obvious reasons. The operation of an order granting a new trial is, unquestionably, expressing it in general terms, to vacate the judgment—that is, it sets aside the findings upon which the judgment rests, and the latter necessarily falls. But this implies a valid and subsisting order, remaining in full force and effect. Here the order has been appealed from, and that appeal was pending and undisposed of at the date of the appeal from the judgment. The effect of the appeal from such order was to suspend the operation of the latter, and render it ineffectual until the determination of such appeal, either by a dismissal thereof or by an affirmation of the order. Pending such appeal the judgment remains subsisting, and, for the purposes of an appeal therefrom, stood as if no order for a new trial had ever been made.

The position of defendants, in effect, is that an order granting a new trial becomes effectual immediately upon its entry, and that the judgment is thereby and at once absolutely wiped out of existence; that the effect of an appeal from such order is not to resurrect or restore the judgment for any purpose, whatever deterrent effect it may exert upon the operation of the order in other respects. Manifestly, this position cannot be maintained. If such was the effect intended for the order, it was idle for the legislature to provide an appeal therefrom, since whatever the result of such appeal the judgment would be gone, and there would be no method of reviving it except as a result of another trial; being absolutely dead, it could not be otherwise restored to existence. Furthermore, if such were its effect, it would logically follow that the trial court could proceed, notwithstanding the pendency of an appeal therefrom, and try the case anew;

but this, it has been held from a very early day in this state, cannot be done. (*Ford v. Thompson*, 19 Cal. 119.) But such is not the effect of the order. While its ultimate effect, if unappealed from, or if sustained upon the appeal where one is taken, is to vacate the judgment and require another trial of the action, such result does not follow until the finality of the order is determined in one or the other modes suggested. In this respect it is not distinguishable from any other order or judgment from which an appeal is given. Pending an appeal therefrom it is suspended and set at large, and the rights of the parties stand unaffected thereby, excepting in so far as their prosecution may be stayed by virtue of the provisions of the statute. That the effect of the order is not to *destroy* the judgment *ipso facto* upon its entry is made clear when we regard the effect of a reversal of the order on appeal. In such case the law does not provide for entering a new judgment in the court below upon the going down of the *remittitur*, as would be required had the judgment wholly ceased to exist, but the judgment as originally entered in that court stands as the judgment in the action, and has effect from the date of such original entry. "The reversal of an order denying a new trial reverses the judgment, but the reversal of an order *granting* a new trial *leaves the verdict and judgment standing*." (Hayne on New Trial and Appeal, sec. 299. And see, also, *Brooks v. San Francisco etc. Ry. Co.* (Cal., Nov. 26, 1895), *ante*, p. 173.)

In support of the view contended for by them, defendants cite us to the following cases from this court: *Walden v. Murdock*, 23 Cal. 549; 83 Am. Dec. 135; *Thompson v. Smith*, 28 Cal. 528, 530; *Kower v. Gluck*, 33 Cal. 401; *Wittenbrock v. Bellmer*, 62 Cal. 558; *Wheeler v. Kassabaum*, 76 Cal. 90; *Bronner v. Wetzlar*, 55 Cal. 419; and it is claimed that these cases settle the law in accordance with the position now taken by them. An examination of those cases, however, shows that they fall very far short of sustaining any such view. They do sustain the general proposition, not questioned, that

the effect of an order granting a new trial is to set aside the judgment; and that is the only question, so far as anything affecting a consideration of this case is concerned, that is necessarily involved in the determination of any of those cases. That proposition is found stated in a general way in various forms, and in one or two instances in language somewhat too broad and loose, and such as perhaps to lend some color to the position now taken by defendants. But, when the cases are read with reference to the questions before the court, they will be found in each instance, we think, not inconsistent with the views we have expressed. In all those cases the court would seem to have used the expressions there found with reference to the effect of such an order, treated as a finality, and a consideration of the question as to when the order becomes final does not appear in any of them to have been involved. In none of them was the question here involved—the effect upon the order granting a new trial of an appeal therefrom, and, consequently, the *status* of the judgment pending such appeal—under consideration. It is true that in the case of *Kower v. Gluck, supra*, most strongly relied upon by defendants, there was, as here, an order granting a new trial, from which an appeal had been taken, and subsequently an appeal from the judgment. The two appeals were considered together, and the court determining that the appeal from the order must be affirmed, held that the effect of the order granting a new trial being to set the judgment aside, the appeal from the judgment became inconsequential, and should be dismissed. This is all that is determined by the case, and to that extent it is obviously correct. If the language, which does not seem to have been carefully chosen to express the meaning of the court, implies anything further, it is not authoritative, because unnecessary to the determination of the question involved. The other cases cited need not be specially reviewed, as we regard them as sufficiently disposed of by what is said above. None of them, when properly con-

sidered, goes to the length contended for by defendant, or is necessary to sustain this motion. To sustain the doctrine urged by defendants would, not only in this but in most instances of the kind, deprive the party of an opportunity to take advantage of the right of appeal afforded by the statute, and that upon grounds which to us seem wholly unsupported by either reason or authority.

The motion is denied.

MCFARLAND, J., GAROUTTE, J., BEATTY, C. J., HENSHAW, J., and TEMPLE, J., concurred.

Mr. Justice HARRISON, being disqualified, did not participate in the foregoing decision.

Rehearing denied.

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[L. A. No. 92. Department One.—January 11, 1896.]

**ANSON H. POTTER, RESPONDENT, v. FRED AHRENS  
ET AL., APPELLANTS.**

**SALE—GOOD WILL—WRITTEN CONTRACT—ESTOPPEL OF MARRIED WOMAN AS VENDOR.**—Where a husband and wife join in the sale of a business and goodwill, and they both covenant and agree with the vendees that neither of them will engage in or carry on a like business in the city where the business was conducted, the wife is estopped by the written contract of sale executed by her from denying her interest or title in the business or goodwill sold.

**ID.—EVIDENCE OF OWNERSHIP — CONFLICT.**—Where the evidence showed that the wife assisted her husband in carrying on the business sold, that they were apparently conducting it together, and that the business was community property, such evidence, taken in connection with her execution of the contract of sale jointly with her husband, is evidence tending to show ownership in her; and the testimony of the defendants that she was not interested in the property or the sale simply raised a conflict, which it was the province of the trial court to determine.

**ID.—STIPULATION FOR LIQUIDATED DAMAGES—EVIDENCE—BREACH OF CONTRACT.**—A contract for the sale of a business and goodwill, containing a covenant of the vendors not to engage in a like business in the same city, may properly stipulate a specified sum as liquidated damages for breach of the covenant, and such stipulation is not to be construed as a penalty; but the evident intention of the parties must control, and the plaintiff is not re-

quired to prove anything more than a breach of the contract in order to recover the stipulated damages.

**ID.—RECOVERY BY REMAINING PARTNER—CONSTRUCTION OF CONTRACT.—**

Where the covenant not to engage in business was made with the vendees as partners, and expressly provided that in case of dissolution of the partnership the covenant should inure to the benefit of the remaining partner, and, in case of a sale of the business by the partnership, should inure to the benefit of their assigns, the provision cannot be limited to a stipulation to pay the partners jointly, or the assigns of both of them; but it inures by its terms to the remaining partner in case of dissolution of the firm, and such remaining partner may recover the stipulated damages without an assignment from the firm.

**APPEAL** from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. **LUCIEN SHAW**, Judge.

The facts are stated in the opinion of the court.

*Anderson & Anderson*, and *H. Bleecker*, for Appellants.

Since a contract in restraint of trade can only be made by a person selling the goodwill of a business, this contract must be held void as to Mrs. Crescence Ahrens. (*Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510; 31 Am. St. Rep. 242; Civ. Code, secs. 1673, 1674.) And as the covenant and judgments are both joint, the plaintiff must succeed as against both or neither. (*Sheldon v. Quinlan*, 5 Hill, 441.) Plaintiff should have proven the actual damage sustained by the breach of the contract. (*Hathaway v. Lynn*, 75 Wis. 186; Civ. Code, secs. 3300, 3359; *Eva v. McMahon*, 77 Cal. 467.) The stipulation for liquidated damages in any event must have a valid contract on which it may be founded. (*Sutherland on Damages*, sec. 280; *Valentine v. Stewart*, 15 Cal. 404; *Pollack on Contracts*, 322; *Lawson on Contracts*, secs. 340, 341.) An unreasonable restraint upon the vendors not necessary for the protection of the vendees is void. (*Mitchel v. Reynolds*, 1 Smith's Lead. Cas. 641.) In every case it must be proved that, as a matter of fact before damages can be stipulated, it would be impracticable or extremely difficult to fix the actual damage. (Civ. Code, secs. 1670, 1671; *Patent Brick Co. v.*

*Moore*, 75 Cal. 209; *Pacific Factor Co. v. Adler*, 90 Cal. 110; 25 Am. St. Rep. 102; *Wilmington Transp. Co. v. O'Neil*, 98 Cal. 1.) In determining whether the sum named is liquidated damages or a penalty, the intention of the parties is immaterial. (*Pacific Factor Co. v. Adler*, *supra*; *Muldoon v. Lynch*, 66 Cal. 540; *Sutherland on Damages*, sec. 289; *Poppers v. Meagher*, 148 Ill. 192; *Bradstreet v. Baker*, 14 R. I. 546; *Davis v. United States*, 17 Ct. of Cl. 201; *Perkins v. Lyman*, 11 Mass. 76; 6 Am. Dec. 158; *Streeper v. Williams*, 48 Pa. St. 450; *Shreve v. Brereton*, 51 Pa. St. 175.) When a lump sum is named, the presumption is that it is a penalty. (*California Steam Nav. Co. v. Wright*, 6 Cal. 262; 65 Am. Dec. 511; *Monmouth Park Assn. v. Wallis Iron Works*, 55 N. J. L. 132; 39 Am. St. Rep. 633; *Nash v. Hermosilla*, 9 Cal. 585; 70 Am. Dec. 676; *Keck v. Bieber*, 148 Pa. St. 645; 33 Am. St. Rep. 849; *Doane v. Chicago Ry. Co.*, 51 Ill. App. 353; 1 *Sutherland on Damages*, sec. 292; 3 *Parsons on Contracts*, 1641; *Gray v. Crosby*, 18 Johns. 219; *Williams v. Dakin*, 22 Wend. 201.)

*Leon F. Moss*, for Respondent.

It is conclusively presumed that the seller of personal property intended to stipulate that he had title and the right to sell (*Clarke on Contracts*, 596; *Civ. Code*, sec. 1765), and he is estopped to deny he had title. (*Tewksbury v. Provizzo*, 12 Cal. 20; 2 *Wharton on Evidence*, par. 1147; *Bigelow on Estoppel*, 452.) Though a contract in general restraint of trade is void, one in partial restraint will be upheld if reasonable. (*Wright v. Ryder*, 36 Cal. 342; 95 Am. Dec. 186; *Brown v. Kling*, 101 Cal. 298; *City Carpet etc. Works v. Jones*, 102 Cal. 506; *Mitchel v. Reynolds*, 1 P. Wms. 181; *Chesman v. Naimby*, 2 *Strange*, 737; 3 *Bro. P. C.* 349; *Davis v. Mason*, 5 *Term Rep.* 118; *Proctor v. Sargent*, 2 *Man. & G.* 31; *Bunn v. Guy*, 4 *East*, 190; *California Steam Nav. Co. v. Wright*, 6 Cal. 258; 65 Am. Dec. 511; *Fisk v. Fowler*, 10 Cal. 517; *Schwalm v. Holmes*, 49 Cal. 665; *French v. Parker*, R. I., (May 17, 1888), 14 *Atl. Rep.* 870; 38 *Alb. L. J.*

237; *Diamond Match Co. v. Roeber*, 106 N. Y. 473; 60 Am. Rep. 464; *Live Stock Assn. v. Levy*, 54 N. Y. Super. Ct. 32; *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64, citing Chitty on Contracts and many other cases; *Washburn v. Dosch*, 68 Wis. 436; 60 Am. Rep. 873; *Whittaker v. Howe*, 3 Beav. 383; *Presbury v. Fisher*, 18 Mo. 50, citing 2 Parsons on Contracts, 751; *Perkins v. Lyman*, 9 Mass. 522; *Stearns v. Barrett*, 1 Pick. 443; 11 Am. Dec. 223; *Palmer v. Stebbins*, 3 Pick. 188; 15 Am. Dec. 204; *Dunlop v. Gregory*, 10 N. Y. 241; 61 Am. Dec. 746; 92 Am. Dec. 751, note; 59 Am. Dec. 685, note; Parsons on Contracts, 747; 22 Am. Law Rev. 873; 26 Cent. L. J. 595, note; 27 Cent. L. J. 530, note; 95 Am. Dec. 193, note; 4 Am. St. Rep. 343, note; 1 Law Rep. anno. 456, note.) Damages for a breach of contract for the purchase of the goodwill of an established trade or business are uncertain and difficult to ascertain. Damages for the breach may be stipulated. (*Norman v. Wells*, 17 Wend. 136; 1 Sutherland on Damages, 507; *Williams v. Dakin*, 17 Wend. 447; 22 Wend. 201; *Baldwin v. Bennett*, 4 Cal. 392; *California Steam Nav. Co. v. Wright*, *supra*; *Fisk v. Fowler*, *supra*; *People v. Love*, 19 Cal. 676; *Streeter v. Rush*, 25 Cal. 68; *Lightner v. Menzel*, 35 Cal. 452; *Cummings v. Dudley*, 60 Cal. 383; *Coffee v. Meiggs*, 9 Cal. 363; *Duffy v. Shockey*, 11 Ind. 70; 71 Am. Dec. 348; *Brown v. Maulsby*, 17 Ind. 10; *Streeper v. Williams*, 48 Pa. St. 450; *Cushing v. Drew*, 97 Mass. 445; *Price v. Green*, 16 Mees. & W. 346-54; *Davis v. Freeman*, 10 Mich. 188; *Ryan v. Martin*, 16 Wis. 57; *Fisk v. Gray*, 11 Allen, 132; *Shreve v. Brereton*, 51 Pa. St. 175; *Maxwell v. Allen*, 78 Me. 32; 57 Am. Rep. 783; *Jaqua v. Headington*, 114 Ind. 309; *Mueller v. Kleine*, 27 Ill. App. 473; *Keeble v. Keeble*, 85 Ala. 552.)

VAN FLEET, J.—The court found, substantially as alleged in the complaint, that on the second day of May, 1893, the defendants were engaged in the business of preparing, dealing in, and vending all kinds of foreign and domestic delicacies for the table, such as prepared

meats, breads, cakes, pies, canned goods, and other household supplies of the kind; and were on said date the owners of a stock of such goods, together with furniture, ranges, etc., used by them in said business, at their place of business in the city of Los Angeles. That on said date defendants sold to plaintiff and one Andrew Wood their said stock of goods, furniture, etc., and the goodwill of the business, for the consideration of three thousand dollars; that upon the payment of said sum, and in consideration thereof, the defendants executed and delivered to said purchasers their certain contract in writing, wherein it was provided that "the said F. Ahrens and Cresence Ahrens covenants and agrees with the said Anson H. Potter and Andrew Wood that neither of us will engage in or carry on a like business in the city of Los Angeles, nor work for or assist anyone to engage in or carry on a business of the same kind or like nature. And in case of a dissolution of the partnership of the said Potter & Wood, this covenant shall inure to the benefit of the remaining partner, with like effect as though there had been no dissolution of partnership; and this covenant shall, in case of a sale of the business by said Potter & Wood, inure to the benefit of their assigns, with the same like force and effect as it would be to the said Potter & Wood had no sale been made; and in case of a violation of this covenant the said F. Ahrens and Cresence Ahrens agrees to pay to the said Potter & Wood, or to their assigns, the sum of three thousand dollars (\$3,000) as liquidated damages. This covenant shall be binding for the space of six years from the date of the consummation of the said sale." That plaintiff and said Wood carried on said business for a time, but thereafter, on June 10, 1893, they dissolved partnership, and Wood sold and delivered to plaintiff his interest in said stock, business, and goodwill, and the latter has since continued said business at the same place. That on November 28, 1894, the defendant, Fred Ahrens, disregarding his said agreement, opened a store in said city, near plaintiff's place



of business, and began conducting a like business to that referred to in said contract; that by reason of the premises plaintiff had suffered damages in the sum of three thousand dollars.

The court further found against defendants, upon a special defense made by them, that said Cresence Ahrens had no interest at the date of said sale in said business, stock of goods, or goodwill, and that her signature to said agreement had been procured by fraud.

Judgment was entered on the findings in favor of plaintiff in the sum of three thousand dollars, and defendants appeal therefrom, and from an order denying them a new trial.

1. It is contended that there is no evidence to support the findings, in so far as they are to the effect that the defendant, Cresence Ahrens, was interested in the sale of the business or goodwill; and that, since a contract in restraint of trade can only be competently made by one who sells the goodwill of a business (Civ. Code, secs. 1673, 1674), the contract in question must be held void as to her. Independently of the question as to whether this defendant is estopped to deny her interest or title by the written contract of sale executed by her, which we think she clearly is (2 Wharton on Evidence, sec. 1147), there is sufficient evidence in the record to sustain the findings of the court in this respect. It appeared that she was the wife of her codefendant, and assisted him in carrying on the business; that they were apparently conducting it together; and that the property in question had all been acquired during the married life of the defendants, and with community funds. Furthermore, the execution by Mrs. Ahrens, with her husband, of the contract of sale, was in itself evidence of ownership in her. The testimony of the defendants, therefore, that she was not interested in the property or the sale simply tended to raise a conflict upon the point, which it was the province of the trial court to determine.

2. It is further contended that plaintiff was not en-

titled to the amount of damages found by the court. No evidence was put in by plaintiff to establish any actual damages suffered, but, relying upon the stipulation on that subject contained in the contract of sale, plaintiff contented himself with showing a breach of the latter and rested. As we have seen, the contract provided that for a violation of their covenant to refrain from engaging in a like business, the defendants agreed to pay to the purchasers, or to their assigns, "the sum of three thousand dollars as liquidated damages." Defendants contend that this provision was in the nature of a penalty, notwithstanding the amount therein designated is termed "liquidated damages"; and that plaintiff was required to prove the actual damage suffered by him, and be confined in his recovery to the amount so shown.

This contention is clearly untenable. While the definition of the parties in contracts of this character is not the invariable and controlling guide for construction, the subject matter of the contract in this case was such as in its very nature, in case of a breach, to render the proof of damages extremely difficult, if not impossible, and to manifestly make a case for liquidated damages. (*Norman v. Wells*, 17 Wend. 163; 1 Sutherland on Damages, 507.) Indeed, the difficulties arising in fixing the actual damages in instances of this kind has been generally recognized in the law, and is so recognized by our code; which makes provision by which parties may in such cases obviate the difficulty. By section 1671 of the Civil Code it is provided that "the parties to a contract may agree therein upon the amount which shall be presumed to be the amount of damages sustained by a breach thereof, when from the nature of the case it would be impracticable or extremely difficult to fix the actual damage." It is perfectly obvious from the terms of the agreement here that the parties, in making the stipulation in question, had in view the very obstacle above provided against, and intended to avoid it by fixing the amount of damages the pur-

chasers should be deemed to have suffered in the event of a breach. This purpose is clear and unmistakable, and the purpose being competent, the intention must be held effectual. (*Streeter v. Rush*, 25 Cal. 68.) In 1 Sutherland on Damages, page 507, the author says: "The damages for breach of contract for the purchase of the goodwill of an established trade or business are so absolutely uncertain that courts have recognized the fullest liberty of parties to fix beforehand the amount of damages in that class of cases. In the decision of such cases the strongest expressions are to be found to the effect that the intention of the parties must govern, and that courts have no power to defeat that intention on the pretext of relieving from a bad bargain." In view of the subject matter and terms of the contract under consideration, we would not be at liberty to put a construction upon the contract so absolutely at variance with the manifest intention of the parties thereto as to hold that the stipulation here was a mere penalty. None of the authorities relied upon by the defendants tend to support such a view. The plaintiff was entitled to stand strictly upon the terms of the covenant, and, having shown a breach, he was properly awarded the amount fixed by the parties as his just redress.

3. There is nothing in the point that plaintiff is not the proper party entitled under the covenant to recover the damages therein fixed for its breach. The only construction that provision of the contract will bear is that the damages are to be paid, in the event of breach, to the purchasers, or to either one remaining in the business in case of dissolution of their partnership, or to their assigns in the event they shall sell to third parties. The clause cannot be limited, as contended by defendants, to a stipulation to pay Potter & Wood, jointly, or the "assigns" of both of them. It inures by its terms to the remaining partner in case of dissolution of the firm; and plaintiff is clearly the "remaining partner" within the terms of the instrument.

4. The other points made are even less plausible of

merit than the foregoing, and we deem it unnecessary to consider them separately or at length. It is sufficient to say that we have not overlooked them and that they involve no error.

The judgment and order are affirmed.

HARRISON, J., and GAROUTTE, J., concurred.

Hearing in Bank denied.

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[No. 16020. Department Two.—January 11, 1896.]

**HANS ANDERSON, RESPONDENT, v. H. H. HINSHAW,  
APPELLANT.**

**NEGLIGENCE—FALL OF DERRICK MAST—INTERFERENCE WITH GUY ROPES—CONFLICTING EVIDENCE.**—Where the plaintiff was injured by the fall of a derrick mast upon which he had climbed for the purpose of adjusting a block and tackle, and there is evidence tending to show that the defendant was negligent in attempting to change one of the two guy ropes by which the mast was sustained, the decision in favor of the plaintiff cannot be disturbed by reason of conflicting evidence to the contrary.

**ID.—OVERRULING MOTION FOR NONSUIT.**—Where there is sufficient testimony to justify the court in submitting the facts to a jury, it is proper to overrule a motion for a nonsuit.

**ID.—APPEAL—INSTRUCTIONS NOT EXCEPTED TO.**—Instructions given by the court to the jury which were not excepted to cannot be considered upon appeal.

**ID.—ORDER DENYING NEW TRIAL—DISCRETION.**—Where it does not appear that the court abused its discretion in denying the motion for a new trial, its order will not be interfered with upon appeal, although, if the motion had been granted, the appellate court could not have disapproved the order.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. A. A. SANDERSON, Judge.

The facts are stated in the opinion.

*Charles L. Weller*, for Appellant.

As it is impossible to reconcile the material inconsistencies of the testimony of the plaintiff, the evidence

is insufficient to justify the verdict. The motion for a new trial should have been granted. (*Jones v. Shay*, 50 Cal. 509; *Cooper v. Pena*, 21 Cal. 403; *Dickey v. Davis*, 39 Cal. 569; *People v. Baker*, 39 Cal. 687; *Hawkins v. Abbott*, 40 Cal. 641; *Mason v. Austin*, 46 Cal. 387; *Sherman v. Mitchell*, 46 Cal. 579.)

*Shadburne & Herrin*, for Respondent.

The granting or denying a new trial on the ground that the evidence is insufficient to justify the verdict, where there is a substantial conflict in the evidence, rests so fully in the discretion of the trial court that its action is conclusive upon this court, unless it appears that there has been an abuse of such discretion. (*Domico v. Casassa*, 101 Cal. 413.) As appellant did not except to the oral charge to the jury of the court below, and specify the particular portions claimed to be objectionable, his objection cannot be considered here. (*Rider v. Edgar*, 54 Cal. 127.)

HAYNES, C.—Appeal by defendant from the judgment and an order denying his motion for a new trial. This action was brought to recover damages for personal injuries alleged to have been sustained through the negligence of the defendant. A jury trial was had, and a verdict returned for the plaintiff, assessing his damages at one thousand dollars. Appellant contends for a reversal principally upon the ground that the evidence is insufficient to justify the verdict.

The plaintiff was employed by the defendant as a farm hand, and, whilst so employed, he ascended a derrick mast, used in hoisting hay, for the purpose of adjusting a block and tackle; while so engaged the mast fell, as plaintiff alleges and contends, through the careless and improper interference by the defendant and his foreman with the guy ropes by which the mast was kept in position, the fall resulting in breaking defendant's leg above the knee.

The evidence is far from satisfactory as to the imme-

diate cause of the fall of the mast. At the time the plaintiff ascended the mast it was supported by two guy ropes, a third rope hanging loose from the top of the mast. Mr. Albert, the defendant's foreman, directed the plaintiff to fasten the third guy rope to a stake before ascending; but defendant said it was not necessary, as the mast was supported by the other two ropes, and he wished to use the hanging rope to climb the mast.

The plaintiff was a sailor, and had followed that occupation for six years, and found no difficulty in reaching the top of the mast. After doing some work at the top, he descended a few feet, and seated himself on the cross-arm, and sat there while Mr. Albert went to a building a hundred yards or more away to obtain a small rope. The defendant was not present when he went up the mast, but returned with Mr. Albert.

The plaintiff testified that the defendant and his foreman pulled over the derrick mast, causing it to fall; that Mr. Hinshaw went over to the loose rope that he had used in climbing the mast, and took it over to where one of the guy ropes was fastened to a post; that Hinshaw and the foreman both took hold of the loose rope, and pulled the mast right down; that both were pulling on the rope when the mast fell, but for what purpose they pulled the rope he did not know, and that Mr. Albert was trying to untie the knot from the stick that was down in the ground.

The defendant and his foreman denied having pulled upon the rope, or that they did anything to cause the mast to fall; that Mr. Albert did not touch the taut part of the guy rope at any time; that he was engaged in untying a small rope from the end of the guy rope, and not interfering with the knot by which it was secured to the post. The defendant testified that he knelt down, and held the guy rope that was fastened to a fence post, but did not pull it or work with it, and that he did not at any time take hold of the loose guy rope, or walk with it to the fastened guy near which he and his foreman were standing when it fell.

They further testified that the mast fell away from the point where they were standing, and insist that if the mast had fallen in consequence of their pulling upon the rope that it would have fallen toward them instead of away from them. The evidence is by no means satisfactory, as it appears in the record.

It is not stated that either of the two guy ropes that sustained the mast when the plaintiff went up were either broken or untied. And it would appear that if the mast was sufficiently supported to enable the plaintiff to climb to the top, work there for some time, and then sit on the mast-arm for ten or twenty minutes, that there must have been some cause operating at the time the mast fell to cause its fall other than the plaintiff's position upon the mast. C. W. Jones, a witness for the plaintiff, but who was not present at the time of the accident, testified that he had a conversation with the defendant after the accident, and asked him how it happened. That the defendant said: "They concluded [meaning himself and foreman] to move a certain guy rope that was in the corral, and I asked him whether Joe, the plaintiff, objected to moving the rope, and he said that he did not know; that Joe should not talk to him and Horace about the rope, as they were supposed to know more about it than Joe did, as he was up there, and they were down below; but said that they had concluded to move the rope that was in the corral; they were afraid that the mules would run against it. He did not say that they had moved the rope at all."

The mast supported by the two guy ropes must have leaned in a direction opposite to the points at which the guy ropes were fastened. If these ropes remained fastened, and the fall of the mast was caused by pulling upon the loose rope in the direction of one of the guy ropes, the mast must have fallen across the line drawn between the points where the guy ropes were fastened. The fall of the mast in the opposite direction shows conclusively that the fall was not caused by pulling upon the loose rope in the direction that the plaintiff

asserted; and it is equally clear that the mast could not have fallen in the opposite direction without one or both of the guy ropes breaking or being untied. The testimony of Jones tends strongly to show that the defendant and his foreman undertook to change one of the guy ropes, and that in doing so the mast fell.

The question then arises, whether the defendant was negligent in attempting to change one of the two guy ropes by which the mast was sustained, and we think the jury were clearly justified in coming to the conclusion—if they found that the defendant did undertake to move one of the guy ropes in order to change its position, while the plaintiff was upon the mast, leaving it secured by but one rope, which could not hold it in position—that it was negligence.

It is, therefore, the not unfrequent case of a conflict of testimony which will not permit a verdict to be disturbed upon appeal.

At the conclusion of the evidence defendant's counsel moved for a nonsuit, which was denied and an exception taken. There was sufficient testimony to justify the court in overruling the motion, and submitting the facts to the jury.

Appellant, in his brief, contends that certain instructions given by the court to the jury were erroneous; these instructions, however, were not excepted to, and cannot, therefore, be considered.

Another point made by appellant is, that the jury disregarded and violated the instructions given by the court upon the question of negligence. The instruction is long, and need not be stated. It was certainly favorable to the defendant, but at the same time fairly left the question for the jury to determine the cause of the fall of the mast, and whether the defendant and his foreman had negligently caused its fall.

Under these instructions, if the jury believed the testimony of the plaintiff, they could properly render a verdict in his favor.

It is also argued by appellant that the evidence of the



plaintiff was so contradictory and unsatisfactory that the court below erred in denying the defendant's motion for a new trial. It does not appear to us from the record that the court abused its discretion in denying said motion; though, if the motion had been granted, we could not have disapproved the order.

The judgment and order appealed from should be affirmed.

BRITT, C., and VANCLIEF, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

McFARLAND, J., TEMPLE, J., HENSHAW, J.

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[L. A. No. 84. Department Two.—January 13, 1896.]

D. O. MCCARTHY, RESPONDENT, v. MT. TECARTE LAND AND WATER COMPANY, APPELLANT.

**ASSIGNMENT OF CLAIM—NOTICE—SUBSEQUENT SETTLEMENT WITH ASSIGNOR.**—Where a claim for goods, wares, and merchandise, sold and delivered to a corporation, has been assigned to another person, and notice of the assignment given to the corporation, a subsequent settlement of accounts with the assignor cannot relieve the corporation from its liability for the debt previously transferred to the assignee.

**ASSUMPSIT—BILL OF PARTICULARS—TIME OF DELIVERY—OBJECTION TO EVIDENCE.**—Where a demand is made upon the plaintiff in an action of *assumpsit* for a bill of particulars, and such bill is delivered six days after the demand, and more than forty days before the trial an objection made upon the trial to the reception of any evidence upon the ground that the bill of particulars had not been served within five days after the demand, no objection having been made to the sufficiency of the account as furnished, the objection to the reception of evidence is properly overruled.

**ID.—CONSTRUCTION OF CODE—DISCRETION OF COURT.**—The object of section 454 of the Code of Civil Procedure, requiring a party to deliver to his adversary within five days after the demand a copy of an account sued upon, or be precluded from giving evidence thereof, is to protect the adverse party from embarrassment upon the trial, by enabling him to demand and obtain in advance a detailed statement of the items charged against him, and the trial court has a sound discretion whether to exact the penalty of precluding the plaintiff from giving evidence thereof or not; and if the demand is not complied with, the prescribed penalty may be exacted for refusal or gross neglect; but if the demandant receives a sufficient copy long enough before the trial

to enable him to examine it and prepare his defense, so far as he is concerned the statute has fulfilled its usefulness.

**ID.—OBJECTION PREVIOUS TO TRIAL.**—Where a party receiving a bill of particulars, which is for any reason objectionable, proposes to object to the introduction of evidence thereunder, he may not wait until the trial, but previous to the trial must move for and obtain an order excluding the evidence.

**APPEAL** from a judgment of the Superior Court of San Diego County and from an order denying a new trial. W. L. PIERCE, Judge.

The facts are stated in the opinion of the court.

*James E. Wadham, and Frederic W. Stearns, for Respondent.*

The court erred in overruling defendant's objection to any testimony relating to the account sued on herein, on the ground that no bill of particulars was ever furnished as required by law. (Code Civ. Proc., sec. 454; *Towdy v. Ellis*, 22 Cal. 651.) A statute is, if possible, to be so construed as to give effect to every part of it, to all of its words and provisions. (*Langenour v. French*, 34 Cal. 92; *Appeal of Houghton*, 42 Cal. 35; *Donlon v. Jewett*, 88 Cal. 530; *Gates v. Salmon*, 35 Cal. 576; 95 Am. Dec. 139; *Bates Refrigerating Co. v. Sulzberger*, 157 U. S. 1.) When the time is prescribed and a penalty provided for a failure to do an act within the prescribed time, the time provision is always mandatory and never directory. (*Shaw v. Randall*, 15 Cal. 385; *Perine v. Forbush*, 97 Cal. 305.) It was not necessary to make the motion to exclude the evidence before the trial. Respondent was in default for failure to serve the bill within the time prescribed by law, and if he desired to be relieved of the consequences of such default, it was his duty to take the proper steps to have the default set aside. (*Tuttle v. Wilson*, 42 Minn. 233.) The books of a party are admissible in evidence only after preliminary proof has been made that the entries were correct at the time they were made, and that the books were fairly and honestly kept. This may be shown by the oath of the party

making the entry or by testimony of persons who have settled their accounts by said books. (*White v. Whitney*, 82 Cal. 163; *Watrous v. Cunningham*, 71 Cal. 30; 1 Smith's Leading Cases, 9 Am. ed., 577, et seq; *Powell v. State*, 84 Ala. 444; *Hancock v. Flynn*, 54 Hun, 638; 8 N. Y. Supp. 133.) Money advanced or loaned is not a proper book entry, and a tradesman's book of account is not admissible to prove items of money loaned. (*Le Franc v. Hewitt*, 7 Cal. 186; *Petit v. Teal*, 57 Ga. 145; *Vosburgh v. Thayer*, 12 Johns. 461; *Case v. Potter*, 8 Johns. 211; *Low v. Payne*, 4 N. Y. 247; *Smith v. Rentz*, 131 N. Y. 169; 1 Smith's Leading Cases, 9th Am. ed. 582, et seq., and cases cited.)

*McDonald & McDonald*, and *Gibson & Titus*, for Respondent.

The account having been assigned to the plaintiff on the twenty-third day of November, 1891, and the defendant's board of directors having been notified thereof on the 26th of November, 1891, J. Harvey McCarthy had no authority to make any settlement of the account with the defendant on the seventh day of October, 1892. (*Myers v. South Feather Water Co.*, 10 Cal. 579; *Gilman v. Curtis*, 66 Cal. 116; *Works v. Merritt*, 105 Cal. 467-69.) The finding of the trial court that no payments other than the sum of two hundred and fifty dollars had ever been made upon the account is supported by some evidence, and is consequently binding upon this court. (*Barry v. Coughlin*, 90 Cal. 220; *Dobinson v. McDonald*, 92 Cal. 33-36; *San Gabriel Wine Co. v. Behlow*, 94 Cal. 110; *Reay v. Butler*, 95 Cal. 214, 215; *Heinlen v. Heilbron*, 97 Cal. 103; *Meyer v. Great Western Ins. Co.*, 104 Cal. 381-86.) The purpose of and reason for section 454 of the Code of Civil Procedure is to apprise the defendant of the particular nature of the demand made, and what would be attempted to be proved against him at the trial, that he may prepare himself to disprove the items if he finds them to be incorrect. As appellant had ample time after the service and before the trial,

he cannot complain. (*Providence Tool Co. v. Prader*, 32 Cal. 638; 91 Am. Dec. 598; *Robbins v. Butler*, 13 Col. 496; *Kellogg v. Paine*, 8 How. Pr. 329.) The motion to exclude the evidence should have been made before the trial. (*Conner v. Hutchinson*, 17 Cal. 279-82; *Isham v. Parker*, 3 Wash. 774.) The penalty of not being permitted to offer evidence should never be enforced except where the party of whom a bill of particulars is demanded willfully refuses or neglects to furnish the same. (*Graham v. Harmon*, 84 Cal. 181, 185.) The plaintiff and J. Harvey McCarthy testified that the entries made by them in the book of the assignee of plaintiff were made at the time of the transactions to which they related and as a part thereof. This foundation was sufficient to render the books competent. (*Rice on Evidence*, 835; *Landis v. Turner*, 14 Cal. 573; *White v. Whitney*, 82 Cal. 163; *Ford v. Cunningham*, 87 Cal. 209; *Pauly v. Pauly*, 107 Cal. 8; 48 Am. St. Rep. 98.)

HENSHAW, J.—Appeals from the judgment and from the order denying a new trial.

Plaintiff averred that between the twenty-first day of August and the twenty-fourth day of November, 1891, the firm of J. Harvey McCarthy & Co. had at the request of defendant sold and delivered to it goods, wares, merchandise, and moneys, of the value of two thousand five hundred dollars; that the interest of the firm in and to said claim and account had been assigned to plaintiff upon November 24, 1891; that thereafter defendant paid to plaintiff on said account the sum of two hundred and fifty dollars, and no more. Judgment was asked for the unpaid amount, with interest. Defendant answered, denying that it ever ordered or received the merchandise or moneys, or any part thereof. It also denied that it had paid two hundred and fifty dollars, or any other sum.

The court found in accordance with the complaint that goods, etc., of the value of two thousand five hun-

dred dollars had been delivered to defendant, and this finding is not attacked.

It found the payment by defendant to plaintiff of two hundred and fifty dollars, and no more. This finding is attacked. The basis of attack is evidence of a settlement had between defendant and J. Harvey McCarthy, a partner of the firm, which settlement it is claimed included all of the items, matters, and things here in controversy. It appears that J. Harvey McCarthy had an action pending against this defendant for goods and merchandise sold, in which he demanded judgment for twelve hundred dollars. A settlement was had between him and the company, and upon a bundle of accounts (some of which embrace the items here in litigation) he signed this receipt: "Payment and full satisfaction of balance due on within accounts, and also of all other demands included in the complaint in the action entitled *J. Harvey McCarthy v. Mt. Tecarte Land and Water Company*, No. 6811."

But McCarthy testified that he did not examine the bills; that he thought the settlement embraced only the items in litigation in the action; and that he so expressed himself to the defendant's attorney, saying at the same time that he had previously assigned to his father (this plaintiff) a claim for two thousand five hundred dollars. The language of the receipt is not at variance with this evidence. Moreover, this settlement was had in 1892. The assignment to plaintiff was executed in 1891, and the directors of the defendant corporation were informed of it at one of their regular meetings shortly after it was made. Under these circumstances a settlement with J. Harvey McCarthy would not relieve defendant from its liability for the debt previously transferred to plaintiff. (*Gilman v. Curtis*, 66 Cal. 116; *Works v. Merritt*, 105 Cal. 467.) There is thus sufficient evidence to sustain the finding of the court.

On the fifteenth day of December, 1894, defendant made demand on plaintiff for a bill of particulars. Six

days thereafter, on December 21st, the bill was served. More than forty days thereafter trial was commenced. Upon the trial defendant, without objection then or previously made to the sufficiency of the account as furnished, opposed the reception of any evidence upon the ground that it had not been delivered within five days after demand. Section 454 of the Code of Civil Procedure provides that a party must deliver to his adversary, within five days after demand, a copy of an account sued upon, or be precluded from giving evidence thereof. It is for a rigid construction of this section that appellant contends, insisting that its provisions are mandatory, and leave the court no discretion in the matter. But this view finds no support in the reason which called the section into existence. In the simplification of pleadings it is designed to protect the adverse party from embarrassment upon the trial, by enabling him to demand and obtain in advance a detailed statement of the items charged against him. If the demand is not complied with, then, for the refusal or gross neglect, the prescribed penalty may be exacted. If the demandant receives the copy long enough before the trial to enable him to examine it and prepare his defense, so far as he is concerned the statute has fulfilled its usefulness. It would be to the last degree oppressive to hold that a plaintiff must lose his cause of action because, though he had furnished the copy of his account more than forty days before the trial, he had served it upon the sixth instead of the fifth day after demand.

The circumstances of this case will serve to illustrate the injustice and oppression which would follow so drastic a rule.

The plaintiff delivered the copy of his account to defendant more than forty days before the trial. No objection was made to its sufficiency. Defendant's secretary compared the account with plaintiff's books. At the trial no item of the account was attacked, no word of evidence offered in dispute of its correctness. The court found that two thousand two hundred and fifty

dollars was justly due to plaintiff, and yet defendant would seek to avoid payment because the copy was served, not so late as to embarrass its defense, but a day later than the statute contemplates.

A court would be reluctant to adopt a construction which would lead to such results, and we are not compelled to do so. We are referred to no authority construing the provisions of such a statute as mandatory; but, on the other hand, it is uniformly held that the language serves but to name a penalty vesting the discretionary power of exacting it or not in the sound discretion of the trial judge. (*Robbins v. Butler*, 13 Col. 496.) In *Graham v. Harmon*, 84 Cal. 181, 185, it is said that the penalty only applies where the party refuses to furnish the copy; and in *Conner v. Hutchinson*, 17 Cal. 279, it is held that if the bill of particulars is for any reason objectionable, and the adverse party proposes to object to the introduction of evidence, he may not wait until the trial, but previous to the trial must move for and obtain an order excluding the evidence. Such is also the rule laid down in *Kellogg v. Paine*, 8 How. Pr. 329, and in *Isham v. Parker*, 3 Wash. 774. This defendant failed to do, and for that additional reason his objection was properly overruled.

Objection was also made to the admission in evidence of certain original books of entry of the firm of J. Harvey McCarthy & Co. To set forth the evidence given as the foundation for their admission would be profitless. Suffice it to say that it was sufficient to warrant the court's ruling.

The judgment and order appealed from are affirmed.

McFARLAND, J., and TEMPLE, J., concurred.





# INDEX.



# INDEX.

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**ABATEMENT.** See **DIVORCE**, 1; **JUDGMENT**, 6, 7.

## **ACCOUNTING.**

1. **ESTATES OF DECEASED PERSONS—ACCOUNTS OF SURVIVING PARTNER—ACTION BY HEIRS—SETTLEMENT WITH ADMINISTRATOR.**—The heirs of a deceased person are not the proper parties to maintain an action for an accounting and settlement of a partnership between the decedent and a surviving partner or his representatives, and they have no legal capacity to do so; but the surviving partner is required to account not with the heirs, but with the executor or administrator of the deceased partner, regardless of whether the partnership assets consist of real or personal property, or both.—*Robertson v. Burrell*, 568.
2. **LACHES—STALE DEMAND—SETTLEMENT OF PARTNERSHIP.**—Where a deceased partner died thirty years before the commencement of an action by his heirs against the administratrix of the surviving partner to compel a settlement of the partnership, and it appears that his widow, the mother of the plaintiff, died seven years after the death of their father, and that no administration was ever had upon the estate of either of them, and that no demand was made upon the surviving partner during his lifetime for a partnership accounting by any one, and the complaint in such action does not aver that the widow did not know of the partnership, nor plead any facts and circumstances showing that discovery of the partnership could not have been sooner made by the plaintiffs, and that plaintiffs have not neglected nor slept upon their rights, the complaint is a stale demand and shows no equity.—*Id.*
3. **KNOWLEDGE OF PARTNERSHIP BY MOTHER OF PLAINTIFFS—PLEADING—ADMISSION.**—Where the complaint does not aver that the widow, mother of the plaintiffs, did not know of the partnership, the complaint must be construed as admitting that she did know thereof.—*Id.*
4. **JOINT RIGHT OF ACTION—EFFECT OF KNOWLEDGE—BAR OF ANCESTOR AND HEIRS.**—Where a right of action is joint, knowledge which would bar it as to one of the plaintiffs would bar it as to all, whether in law or in equity; and, where a right of action is barred as to the ancestor, it is also barred as to his heirs; and the long silence and inaction of the mother of the plaintiffs, for seven years after the death of her husband, in connection with the fact that no claim was ever made upon the surviving partner by any one for thirty years, renders the demand of plaintiffs stale, though they were minors at the time of the father's death.—*Id.*

## ACCOUNTING (Continued).

5. **DEATH OF ORIGINAL PARTIES—SCRUTINY OF PLEADING—SHOWING OF DILIGENCE.**—After the lapse of a long time, and after the death of all the original parties, equity, for the peace of society, scrutinizes a bill for an accounting with great particularity, and is not satisfied to retain it unless the fullest possible credible showing of diligence is made by the applicants for relief; and it is not sufficient to allege innocence at one time, and discovery at another, but the facts and circumstances must be pleaded, in order that the court may determine whether the sources of knowledge availed of were not at all times open to the plaintiffs, whether they were negligently overlooked, whether other circumstances should not earlier have put plaintiffs upon discovery, and what was the nature of the concealment practiced, if any, stating whether it consisted in mere silence, or was accompanied by active misrepresentation and fraudulent deception.—*Id.*

See **CONTRACT; ESTATES OF DECEASED PERSONS, 17-19; GUARDIAN AND WARD.**

**ADVERSE POSSESSION.** See **BOUNDARIES, 3-4.**

**AGENCY.**

**AUTHORITY OF AGENT—CONTRACT FOR GRANITE COPING—CHANGE OF SPECIFICATIONS.**—Where an agent was authorized to have a granite coping constructed around a cemetery lot of the principal, of the same quality of material as that of the coping around another lot, and the work was done like the other coping, and of the same quality of material, and the principal expressed satisfaction with it before it was completed, it is immaterial that the agent named a different kind of granite in the plans and specifications for the coping, and afterward assented to the change of the contract to the same kind of rock as that used in the other coping.—*Western Granite and Marble Company v. Souc, 431.*

See **ATTORNEY AND CLIENT.**

**ALIMONY.** See **CERTIORARI, 1.**

**AMENDMENT.** See **PRACTICE, 2, 3.**

**APPEAL.**

1. **MOTION TO DISMISS—SUPPLYING DEFECTS IN TRANSCRIPT.**—Where a motion is made to dismiss an appeal upon the ground that the transcript is not properly authenticated, and that it fails to show that the notice of appeal had been served upon adverse codefendants, appellant may, under rule XV of the appellate court, which is to be liberally construed for the purpose of enabling the appellant to present his appeal upon the merits, remedy any defects or omission of the transcript, and may supply at the hearing the proof of service of the notice of appeal.—*Warren v. Hopkins, 506.*
2. **NOTICE OF APPEAL—PROOF OF SERVICE—PRACTICE—JURISDICTION.**—The better practice is to have the proof of service of the notice of appeal made a part of the record in the court from which the appeal is taken, and, in such case, the record, when properly certified to this court, becomes conclusive evidence of the facts

## APPEAL (Continued).

therein stated; but the jurisdiction of the appellate court does not depend upon proof of the fact of service being contained in the transcript, but upon the fact that the notice of appeal has been properly served; and the appellant may file in the appellate court either original proof of the service, or a certificate of the clerk of the court below that such proof has been made and filed in that court.—*Id.*

3. INSTRUCTIONS NOT EXCEPTED TO.—Instructions given by the court to the jury which were not excepted to cannot be considered upon appeal.—*Anderson v. Hinshaw*, 682.
4. ORDER GRANTING NEW TRIAL—EFFECT UPON JUDGMENT—DISMISSAL.—Although a valid and subsisting order granting a new trial, which remains in full force and effect, operates to set aside the findings, and judgment, yet where an appeal is taken from the order granting a new trial, it suspends the operation of the order, and pending such appeal the judgment remains subsisting for the purposes of an appeal therefrom, as if no order for a new trial had been made, and an appeal from the judgment cannot be dismissed upon the ground that it was vacated by the order granting a new trial.—*Pierce v. Birkholm*, 669.
5. EFFECT OF REVERSAL OF ORDER.—The reversal of an order granting a new trial leaves the verdict and judgment standing.—*Id.*
6. SERVICE OF NOTICE UPON CODEFENDANT—DISMISSAL.—Where an action was brought against two defendants upon a contract of guaranty executed by them to the plaintiff, and was tried solely upon issues presented by the separate answer of one of them, and the record does not show that the codefendant had answered the complaint, it appears that a reversal of the judgment would have no effect upon the rights of such codefendant; and it is not necessary, upon an appeal from the judgment, to serve the notice of appeal upon such codefendant, nor will the appeal be dismissed for want of such service.—*French v. McCarthy*, 12.
7. DISMISSAL—PROOF OF SERVICE OF LOST NOTICE—SUPPLY OF RECORD.—Where a motion is made to dismiss an appeal upon the ground that the transcript fails to show that the notice of appeal was served upon the respondent, the appellant in reply thereto may file as a portion of the record a certified copy of proceedings in the superior court, showing that the original notice of appeal has been lost, and that it has been established to the satisfaction of that court that the notice of appeal set forth in the printed transcript was duly served, and a written admission of the service made by the attorney for the respondent indorsed upon the same, and that said notice of appeal was filed in the office of the clerk of that court; and that the court thereupon made an order directing that a copy of the notice of appeal, together with the affidavit showing its original filing and service, be filed *nunc pro tunc*; and the substituted papers made upon such order of the court are entitled to the same weight as the originals.—*Knowlton v. Mac-kensie*, 183.
8. DISMISSAL—FAILURE TO SERVE ADVERSE PARTIES ON MOTION FOR A NEW TRIAL.—Matters occurring prior to the judgment or order appealed from cannot be considered on a motion to dismiss an appeal upon the ground that the appeal has not been perfected; and the failure to serve the adverse party with the notice of intention to move for a new trial, or with the draft of

## APPEAL (Continued).

a statement of the case, though it may be a reason for denying the motion for a new trial, or for refusing to settle the statement, or be a ground for affirming or reversing the order appealed from, does not deprive the appellate court of jurisdiction to hear the appeal, or constitute a reason for its dismissal upon the ground that the court has not acquired jurisdiction to hear it.—*Estate of Ryer*, 556.

9. **UNAUTHENTICATED TRANSCRIPT—AUTHENTICATION BEFORE HEARING OF MOTION.**—Where a motion is made to dismiss an appeal upon the ground that the transcript has not been properly authenticated, if the appellant, prior to the hearing of the motion, files with the clerk of the appellate court a transcript properly authenticated by the clerk of the superior court, the ground of the motion is removed.—*Id.*
10. **APPEAL FROM ORDER DENYING NEW TRIAL—SERVICE OF NOTICE—ADVERSE PARTY.**—Upon appeal from an order denying a new trial, the parties to the motion in the court below are the only proper parties to the appeal, and the appellant is not required to serve a notice of appeal upon others than those to whom the original notice was directed, and who appear by the record to be adverse parties; and only the record can be examined for the purpose of determining who are such adverse parties.—*Id.*
11. **USE OF ORDER IN COLLATERAL ACTION—REMOTE EFFECT UPON THIRD PARTIES.**—The fact that the judgment or order appealed from may be used as evidence in some collateral action or proceeding, or that its reversal may have a remote or consequential effect to the prejudice of one who is not a party thereto, does not entitle such person to be made a party to the appeal; and no evidence extrinsic to the record to show that the reversal would have such effect can be received or considered on motion to dismiss the appeal.—*Id.*
12. **APPEAL IN PROBATE PROCEEDINGS—JUDGMENT-ROLL.**—There is no judgment-roll, strictly speaking, in proceedings in probate, but whenever such proceedings are so akin to a civil action as to necessitate the "papers" which are declared by section 670 of the Code of Civil Procedure to constitute the judgment-roll in a civil action, they may be held to constitute the judgment-roll referred to in section 661 of the Code of Civil Procedure.—*Id.*
13. **PETITION OF HEIR FOR SHARE OF ESTATE—COLLATERAL INQUIRY—NOTICE—PARTIES.**—The petition of an heir for a share of the estate of a deceased person is in the nature of a collateral inquiry, or episode, interjected into the proceedings for the administration of the estate, presenting all the elements of a civil action instituted for the purpose of determining the right of the appellant to a share of the estate, and, in matters of procedure upon an appeal, should receive the same consideration as upon an appeal in a civil action; and it is only parties to the record who have appeared and resisted the application, upon the service of notice of the application, as required by section 1659 of the Code of Civil Procedure, who will be affected by a reversal of the judgment or order denying a new trial, and persons or corporations who did not resist the application, or place themselves upon the record, or make themselves parties to the proceeding, though they may have a beneficial interest in the estate, are not required

## APPEAL (Continued).

- to be served with the notice of motion for a new trial, or with the notice of appeal in such proceeding.—*Id.*
14. **TEST OF JURISDICTION—JUSTICE'S COURT—SUM DEMANDED—COSTS EXCEEDING THREE HUNDRED DOLLARS—DISMISSAL.**—Where the demanded sum is less than three hundred dollars, the jurisdiction of the justice's court and also the appellate jurisdiction of the supreme court must be tested by the sum demanded in the complaint, and the costs of the action in the justice's court and in the superior court, upon appeal therefrom, are merely incidental to the action, and cannot be made the subject of an appeal to the supreme court, although the costs allowed may amount to more than the sum of three hundred dollars, and an appeal therefrom must be dismissed.—*Henigan v. Ervin*, 37.
15. **NONAPPEALABLE ORDER—SPECIAL ORDER AFTER JUDGMENT—APPEAL FROM JUSTICE'S COURT.**—A special order after judgment refusing to strike out a cost bill in the superior court, in a case appealed from the justice's court, is not appealable to the supreme court, although the cost bill amounts to over three hundred dollars.—*Id.*
16. **JUDGMENT—REVIEW OF EVIDENCE.**—Under section 939 of the Code of Civil Procedure the sufficiency of the evidence to support the judgment cannot be considered on an appeal therefrom, unless the appeal is taken within sixty days after the rendition thereof.—*Brooks v. San Francisco & North Pacific Railway Co.*, 173.
17. **REVIEW—REASONS FOR DECISION.**—Upon an appeal the reasons for the decision of the trial court are immaterial, if the conclusion reached is justifiable, and the judgment will be affirmed if it is right upon any ground.—*McGrath v. Carroll*, 79.
18. **FRIVOLOUS APPEAL—DAMAGES.**—Where it is evident that an appeal is frivolous, and taken purely for delay, the appellant will be mulcted in damages.—*Muller v. Rowell*, 318.
19. **STAY OF EXECUTION—JUSTIFICATION OF SURETIES BEFORE CLERK—OPTION—SECOND JUSTIFICATION—JURISDICTION OF SUPERIOR COURT—PROHIBITION.**—Where exception is made to the sufficiency of sureties upon a stay bond upon appeal, the parties have the option, under the statute, to justify either before a judge of the superior court or the county clerk; and where a justification is had before the county clerk, the court has no power to order the sureties to appear before it for a second justification; and a writ of prohibition will issue from the supreme court to prevent such action of the superior court.—*Boyer v. Superior Court*, 401.
20. **AUTHORITY OF COUNTY CLERK—REVIEW BY COURT.**—The county clerk and a judge of the superior court are vested by the statute with equal authority as to the justification of sureties; and there is no provision of law for a review by the trial court of the action of the county clerk in passing upon the sufficiency of the sureties. *Id.*
21. **CONSTRUCTION OF CODE—AUTHORITY TO ORDER NEW BOND.**—The authority given by the amendment of 1895 to section 954 of the Code of Civil Procedure is confined to the ordering of a new bond upon appeals from money judgments, where a perfect bond has been prepared and filed in the first instance, and any imper-

## APPEAL (Continued).

fections thereto have subsequently arisen; and that amendment does not provide for a further or second justification of the sureties upon the original bond.—*Id.*

22. **PRINTING AND FILING OF TRANSCRIPT—DEPOSIT WITH CLERK—CONSTRUCTION OF RULE XII.**—Rule XII of the supreme court, which provides that the written transcript in civil cases may be filed with the clerk of the court if, when presented for filing, it be accompanied with sufficient funds to pay the expenses of printing, and that the clerk, upon receipt thereof, shall cause the transcript to be printed, etc., should be strictly enforced and obeyed as written, and a deposit of the transcript with the clerk, without the funds necessary to pay for the printing, is not in compliance with the rule.—*Ward v. Healy*, 587.
23. **MOTION TO DISMISS APPEAL—FILING OF TRANSCRIPT AFTER NOTICE OF MOTION—TRANSIT OF TRANSCRIPT.**—Where a motion to dismiss an appeal and the printed transcript were filed upon the same day, the appellant's rights are not saved thereby, if the transcript was not filed before the notice to dismiss was served; nor is the fact that the printed transcript was in the office of the express company in transit to the clerk for filing when the motion to dismiss was served, the equivalent of filing the transcript within rule V of this court.—*Id.*
24. **EXCUSE FOR FAILURE TO FILE TRANSCRIPT—AGREEMENT WITH CLERK.**—While no understanding or agreement between the clerk of the court and the appellant's attorney can dispense with a compliance with rule XII of the court, or give appellant any right in law to rely upon any such understanding, yet, where that rule has not been heretofore construed, and appellant's attorney, relying upon an agreement with the clerk, whereby the clerk, though without authority, in effect waived the payment of funds provided for by the rule, and consented to the printing of the transcript for him by appellant's attorney, which was printed without unnecessary delay, *held*, that the failure to file the printed transcript is so far excused by the circumstances that the appeal should not be dismissed for noncompliance with rule XII.—*Id.*

See CERTIORARI, 1-3; ESTATES OF DECEASED PERSONS, 23, 24; JURY AND JURORS, 2; JUSTICE'S COURT, 2, 3; MORTGAGES, 10; PROHIBITION; PUBLIC OFFICERS, 1, 2.

APPROPRIATION. See WATER AND WATER RIGHTS.

ARBITRATION. See MUTUAL BENEFIT SOCIETY, 2.

ASSAULT. See EVIDENCE, 10, 11.

ASSESSMENT. See STREET ASSESSMENT; TAXATION.

ASSIGNMENT.

**ASSIGNMENT OF CLAIM—NOTICE—SUBSEQUENT SETTLEMENT WITH ASSIGNOR.**—Where a claim for goods, wares, and merchandise, sold and delivered to a corporation, has been assigned to another person, and notice of the assignment given to the corporation, a subsequent settlement of accounts with the assignor cannot relieve the corporation from its liability for the debt previously transferred to the assignee.—*McCarthy v. Mt. Tecate Land and Water Co.*, 687.

See LANDLORD AND TENANT, 1-3; STREET ASSESSMENT, 8, 12.



## ATTORNEY AND CLIENT.

1. **AUTHORITY OF ATTORNEY TO BIND CLIENT—PRESUMPTION—KNOWLEDGE OF CLIENT'S INSTRUCTIONS.**—Although, as a general rule, a stipulation of an attorney will be presumed to have been authorized by the client, yet, when the adverse party, as well as the court, is aware that the attorney is acting in direct opposition to his client's instructions or wishes, the reason of the rule ceases, and the court ought not to act upon the stipulation, nor can the adverse party claim the right to enforce a judgment rendered by reason thereof.—*Knowlton v. Mackensie*, 183.
2. **CONSENT TO MODIFICATION OF JUDGMENT—AUTHORITY OF ATTORNEY.**—For the purpose of prosecuting and defending an action the authority of an attorney ordinarily terminates with the entry of judgment except for the purpose of enforcing it, or seeking to have it set aside or reversed; and, when the judgment has once been entered under the direction of the court, the rights of the client have been determined, and the attorney ceases to have any authority to consent to its modification, to the prejudice of the client, without his consent.—*Id.*

See ESTATES OF DECEASED PERSONS, 8, 12; NEGLIGENCE, 8-14; WILLS, 7, 8.

**BILL OF LADING.** See COMMON CARRIER.

**BILL OF PARTICULARS.**

1. **ASSUMPSIT—OBJECTION TO EVIDENCE.**—Where a demand is made upon the plaintiff in an action of *assumpsit* for a bill of particulars, and such bill is delivered six days after the demand, and more than forty days before the trial, an objection made upon the trial to the reception of any evidence upon the ground that the bill of particulars had not been served within five days after the demand, no objection having been made to the sufficiency of the account as furnished, the objection to the reception of evidence is properly overruled.—*McCarthy v. Mt. Tecate L. & W. Co.*, 687.
2. **CONSTRUCTION OF CODE—DISCRETION OF COURT.**—The object of section 454 of the Code of Civil Procedure, requiring a party to deliver to his adversary within five days after the demand a copy of an account sued upon, or be precluded from giving evidence thereof, is to protect the adverse party from embarrassment upon the trial, by enabling him to demand and obtain in advance a detailed statement of the items charged against him, and the trial court has a sound discretion whether to exact the penalty of precluding the plaintiff from giving evidence thereof or not; and if the demand is not complied with, the prescribed penalty may be exacted for refusal or gross neglect; but if the demandant receives a sufficient copy long enough before the trial to enable him to examine it and prepare his defense, so far as he is concerned the statute has fulfilled its usefulness.—*Id.*
3. **OBJECTION PREVIOUS TO TRIAL.**—Where a party receiving a bill of particulars, which is for any reason objectionable, proposes to object to the introduction of evidence thereunder, he may not wait until the trial, but previous to the trial must move for and obtain an order excluding the evidence.—*Id.*

**BONA FIDE PURCHASER.** See PLEDGE, 2.

**BOND.** See APPEAL, 19-21; INJUNCTION.

**BOUNDARIES.**

1. **PARTITION FENCE—LOCATION OF BOUNDARY—CONFLICTING EVIDENCE.**—Where there is conflicting evidence as to whether a partition fence was constructed upon the line of an old fence constituting a partition boundary, which had been destroyed by a freshet, or whether the new fence was rebuilt further north than the true line, a finding that it was not rebuilt upon the line of the old fence, but was rebuilt a few paces further north, within the exterior limits of a specified survey, will not be disturbed upon appeal.—*Peters v. Gracia*, 89.
2. **PROOF OF SURVEY—FAULTY METHOD—ASCERTAINMENT OF BOUNDARY—SUPPORT OF FINDING.**—Where a survey of the boundary line in dispute, which pursued a faulty method of ascertaining the boundary by not commencing at the proper starting point, is admitted in evidence without objection, it becomes evidence, though apparently not the best, of the location of the line in the place claimed by the plaintiff, and a finding of the court in accordance therewith is supported by the evidence.—*Id.*
3. **MISLOCATION OF PARTITION FENCE—STATUTE OF LIMITATIONS—ADVERSE POSSESSION.**—Where it is proven that an agreement existed between the owners of adjoining surveys that the land upon which a fence and ditch was located belonged to one of them, and that his land in fact extended further south than the fence and ditch, and that a joint survey would be made to fix the true line, the possession of the other owner to the fence and ditch is not adverse, and the statute of limitations does not run against the true owner.—*Id.*
4. **DECLARATIONS OF ADJOINING OWNERS—STATEMENTS OF DECEASED PERSONS—CREDIBILITY OF WITNESSES.**—Evidence of the declarations of adjoining owners made long prior to the commencement of the action, some of which were made by deceased persons, for the purpose of showing that it was understood between the adjoining owners that a fence between them was not upon the true partition line is admissible, although it is a just caution addressed to the trial court that there is danger of relying upon the declarations of deceased persons when it becomes impossible of contradiction; but the credibility of such evidence is for the consideration of the judge of the court who saw and heard the witnesses.—*Id.*

See SURVEY.

**BRIBERY.** See CRIMINAL LAW.

**BURGLARY.** See CRIMINAL LAW, 4.

**CERTIORARI.**

1. **DIVORCE—ALIMONY—SALE OF HUSBAND'S PROPERTY BY RECEIVER—APPEAL.**—An order after judgment directing the sale by a receiver of property of the husband for the purpose of satisfying a judgment for alimony is appealable, and, regardless of whether

## CERTIORARI (Continued).

there is an excess of the jurisdiction of the court in making it, the remedy by appeal is conclusive of the right to review it upon *certiorari*.—*White v. Superior Court*, 54.

2. JURISDICTION—ERRORS NOT REVIEWABLE.—Upon *certiorari* the single question involved is whether the lower court has exceeded its jurisdiction; and, if it has not, no matter how grievously it may have erred, either in matters of fact or matters of law, the writ of *certiorari* will not afford relief to the party prejudiced; and, where recitals of fact in the judgment or order are sufficient to sustain it, those recitals are conclusive, and no evidence can be received to impeach them.—*White v. Superior Court*, 60.
3. PROCEEDINGS FOR CONTEMPT—DIVORCE—DECREE RESPECTING PROPERTY RIGHTS.—The court having jurisdiction of an action for divorce, has power to put a proper restraint upon the disposition of property by the husband, pending the final determination of the rights of the parties therein; and, where the decree of divorce reserving property rights for future consideration enjoins the husband from making any disposition of his property until the final decree is entered, the court has power to punish him for contempt in making leases of his land in violation of the injunction, and interfering with and obstructing the receiver appointed by the court in his efforts to take possession of the property; and *certiorari* will not lie to review any error in the injunction order which could have been corrected by appeal, nor any question of fact passed upon in the proceedings for contempt.—*Id.*
4. FORMER ADJUDICATION—JEOPARDY—POWER OF COURT.—The defense of a former adjudication does not go to the jurisdiction of the court, and when the question of whether the contempt charge has been before adjudicated, or whether the petitioner has been twice in jeopardy for the acts of which he was convicted of contempt, the court has the same power to pass upon it as upon any other question in the case; and any error in its ruling cannot be reviewed upon *certiorari*.—*Id.*
5. TRANSFER OF DIVORCE CASE—VIOLATION OF RULE.—The fact that the divorce action in which the proceedings for contempt were had was transferred by the presiding judge from one department of the superior court to another, in violation of a rule of court, does not involve the question of jurisdiction, nor render the judgment void.—*Id.*

## COMMON CARRIERS.

1. DELIVERY OF GOODS TO WRONG PARTY.—Where goods shipped to a consignee were delivered by a common carrier to a third party, who personated the consignee, and received, receipted for, and paid the freight thereon, whereby the goods were lost to the shipper, the carrier so misdelivering the goods is liable to the shipper for their value.—*Cavallaro v. Texas and Pacific Railway Co.*, 348.
2. INTERMEDIATE CARRIAGE—LIABILITY OF FINAL CARRIER.—Where goods are shipped through several carriers upon a through shipment, the final carrier is liable to the owner under its common-law liability, whether there was an express contract between it and the shipper, or only such agreement as the law implies from the acceptance of the goods directed to the consignee at the end of its route.—*Id.*

## COMMON CARRIERS (Continued).

3. MISDELIVERY NOT EXCUSABLE.—No circumstances of fraud, imposition, or mistake will excuse a common carrier from responsibility for delivery to the wrong person; but the law exacts of him absolute certainty that the person to whom the delivery is made is the party rightfully entitled to the goods.—*Id.*
4. CHANGE OF LIABILITY TO THAT OF WAREHOUSEMAN—NOTICE TO CONSIGNEE ESSENTIAL.—A common carrier cannot change his liability to that of a warehouseman as to goods which have arrived at the place of consignment, without giving notice to the consignee of the arrival, and where the notice is given by mistake to the wrong person, it cannot have the effect to change the liability of the carrier to that of a warehouseman.—*Id.*
5. LAWS OF ANOTHER STATE—PRESUMPTION.—In the absence of proof to the contrary, the laws of another state will be presumed to be the same as those of California, and this presumption extends to statutory law as well as to the common law.—*Id.*
6. RULE REQUIRING NOTICE—DECLARATORY STATUTE.—The rule of the statute of California requiring notice to be given by the carrier to a consignee is a declaration of the law as it existed prior to that statute in a majority of the states and in England.—*Id.*
7. PLACE OF DELIVERY—FREIGHT CONSIGNED GENERALLY.—Where freight is consigned to the consignee at the terminus of the route generally, without specifying delivery at a place of business, the station or depot of the railroad is the place of delivery.—*Id.*
8. EXONERATION OF CARRIER—UNINDORSED BILL OF LADING.—A carrier is not exonerated from liability by delivery of the goods to a holder of the bill of lading where it is unindorsed and not payable to bearer, and where such holder is not the consignee, and not entitled to the delivery of the goods.—*Id.*
9. MISDELIVERY OF GOODS BY WAREHOUSEMAN.—A carrier acting as a warehouseman is not authorized to deliver goods to a stranger who presents an unindorsed bill of lading, and who is not identified as the consignee, or as having any right to the bill of lading or to the goods.—*Id.*
10. NEGOTIABILITY OF WAREHOUSE RECEIPTS AND BILLS OF LADING.—Warehouse receipts are negotiable unless they have the word "non-negotiable" printed in red ink across their face, and when negotiable an indorsement of the receipt operates as a valid transfer of the property represented by the receipt; and there is no difference between a warehouse receipt and a bill of lading in this respect.—*Id.*
11. REPEATED DELIVERIES TO WRONG PERSON.—In the absence of any act or conduct on the part of the consignor whereby he is estopped, the carrier cannot be relieved from repeated deliveries to the wrong person, upon the ground that the same person who presented himself as the consignee of subsequent shipments, lived and carried on business at the street and number at which similar business was carried on by the true consignee.—*Id.*
12. DISTINCTION BETWEEN SPECIAL AND GENERAL CONSIGNMENT OF GOODS.—Different considerations arise in cases where goods are consigned to a given number and street, and are there delivered to a person apparently the one to whom they were consigned, and in cases where the goods are consigned generally without specific designation.—*Id.*

## COMMON CARRIERS (Continued).

13. **PLEADING—COUNT AGAINST COMMON CARRIER—RECOVERY AGAINST CARRIER AS WAREHOUSEMAN.**—Where the defendant, whether regarded as a common carrier or as a warehouseman, is liable for misdelivery of the goods, a plaintiff who has counted upon the liability of defendant as a common carrier may recover against such carrier as a warehouseman.—*Id.*

**COMMUNITY PROPERTY.** See **DIVORCE**, 4; **HOMESTEAD**, 2; **NEGLIGENCE**, 1, 2.

**CONSIDERATION.** See **SURETY**, 1, 2.

**CONSIGNOR AND CONSIGNEE.** See **COMMON CARRIER**.

**CONSTITUTIONAL LAW.** See **INDUSTRIAL SCHOOL**; **MORTGAGE**, 15.

## CONTEMPT.

1. **SUBSEQUENT ORAL MODIFICATION—POWER OF COURT.**—It is doubtful whether the court has power, at a date subsequent to the time fixed by its decree, to make a material modification and change in the terms of a decree fixing a time for a payment or tender, after which the rights of the plaintiffs are to cease, if no payment or tender is made, by extending the time for a tender after the plaintiffs have forfeited their rights under the decree by its original terms; but where such attempted modification of the decree was merely announced orally from the bench, and not entered of record, the court has no jurisdiction, upon a subsequent tender by the plaintiff and refusal of the defendants to make a conveyance, to punish the defendants for contempt of court for such refusal.—*Cosby v. Superior Court*, 45.
2. **CRIMINAL OFFENSE—CONSTRUCTIVE CONTEMPT—ORDER NOT OF RECORD.**—Contempt of court is a specific criminal offense, and a party cannot be held guilty of constructive contempt for refusing to comply with a mere verbal announcement of a direction or order having no existence of record.—*Id.*
3. **DECREES OF COURT—REQUIREMENT OF WRITING—RECORD—ORAL MODIFICATION.**—Decrees of court are required to be in writing and remain of record, and those affected thereby have a right to stand by such record, and, unless a change is made in the record, and knowledge brought home to the party sought to be charged thereby, he has a right to regard the decree as entered as the final direction of the court, and to disregard any oral modification thereof having only a mere potential existence.—*Id.*
4. **NUNC PRO TUNC ORDER—JURISDICTION.**—The court cannot acquire jurisdiction to punish a defendant for contempt by entering a *nunc pro tunc* order modifying the decree at the hearing of an order to show cause why the defendant should not be punished for contempt, so as to make the record conform to a prior verbal order not previously entered of record.—*Id.*
5. **JUDGMENT FOR CONTEMPT—WRIT OF PROHIBITION.**—There is no appeal from a judgment of contempt, and where such judgment,

## CONTEMPT (Continued).

although entered, has not yet been fully carried out or executed, a writ of prohibition will lie to prevent further proceedings of the court in the matter of the contempt.—*Id.*

6. FINDINGS OF FACT—HABEAS CORPUS.—The findings of fact recited by the court in the order of commitment of a person committed for contempt must be held to have been authorized by the evidence, and are not subject to be controverted, upon writ of *habeas corpus*.—*Ex parte Clark*, 405.
7. PRIOR PUNISHMENT FOR CONTEMPT—AUTHORITY OF COURT—VIOLATION OF SUBSEQUENT ORDER.—The court is not deprived of authority to punish for contempt, by reason of a prior imprisonment for contempt in a matter distinct from that for which the subsequent order was made, where it appears that the contempt first punished was committed prior to the first imprisonment, and that the offense subsequently punished is the violation of a subsequent order which could not have been made the basis of the prior contempt.—*Id.*
8. REFUSAL OF INSOLVENT TO SURRENDER PROPERTY.—After an adjudication of insolvency, regardless of whether the proceeding is in voluntary or involuntary insolvency, the insolvent is at all times subject to an examination by the court in relation to his property or estate, and if upon such examination the insolvent shall admit or the court shall find that he has omitted certain property from his inventory, the court has the same authority to direct him to deliver this property to the assignee, as it had to direct him to file the inventory, and he may be punished for contempt for refusal to comply with such direction.—*Id.*

See CERTIORARI, 3, 4; RECEIVER, 1.

## CONTRACT.

1. NEGLIGENCE—MASTER AND SERVANT—BREACH OF CONTRACT—SETTLEMENT—NEW CONTRACT—DEFENSE—COUNTERCLAIM—CROSS-COMPLAINT.—In an action against a defendant employed to bud a quantity of young fruit trees, for alleged negligence in executing the contract, to the damage of the plaintiff, where the answer denies the alleged negligence, and pleads an accounting and settlement of all accounts and differences in relation to the budding of the trees, and the making of a new contract in connection with such accounting and settlement for payment of the services, alleged to have been broken by the plaintiff, for which breach the defendant pleads a counterclaim, and also a cross-complaint, claiming damages for breach of the new contract in a sum less than three hundred dollars, the answer discloses a defense to the plaintiff's demand; but the facts pleaded are insufficient to constitute a counterclaim or cross-complaint, because it does not show a cause of action arising out of the transaction set forth in the complaint, nor connected with the subject of the action; nor is the amount of the defendant's demand against the plaintiff within the jurisdiction of the superior court to justify recovery upon an independent counterclaim.—*Griswold v. Pieratt*, 259.
2. ACCOUNTING—NEW CONTRACT—IMPROPER ACTION.—Where an accounting and settlement is had between the parties under a prior contract, by which a different compensation and mode of compen-

## CONTRACT (Continued).

sation is fixed for services rendered, and the time for performance enlarged, the accounting and settlement becomes a new contract, and is conclusive upon both parties unless impeached for fraud, accident, or mistake, and no action will lie upon the original contract while the new contract remains in force.—*Id.*

3. COMMISSION ON PURCHASE OF LAND—INDIVISIBLE CONDITION.—A written contract, by the terms of which the promisor agrees to pay a stipulated commission after the expiration of a certain time from the date of the delivery to him of a deed to an undivided half interest in a particular tract of land, is indivisible, and the promisee does not acquire a *pro tanto* right to the commission upon the delivery to the promisor of a deed for a less interest in the land.—*Witte v. Taylor*, 224.
4. PRO TANTO RIGHT TO COMMISSION.—Conceding that a *pro tanto* right to such commission might result from the conveyance of a less interest in the land to the promisor, such right could not mature until after the expiration of the time limited by the contract for the payment of the stipulated commission.—*Id.*

See AGENCY; NEGLIGENCE, 9-13; RESTRAINT ON ALIENATION; SALE; STREET ASSESSMENT; UNDUE INFLUENCE.

CONTRIBUTION. See CORPORATIONS, 5; STATUTE OF LIMITATIONS, 1.  
CONVERSION.

1. CONVERSION OF GOODS—PLEADING—DEMAND AND REFUSAL.—A complaint alleging that the plaintiff was the owner and lawfully entitled to the immediate possession of a stock of goods at a date specified, upon which date defendants, then being in possession of said goods, unlawfully converted and disposed of the same to their own use, whereby plaintiff sustained damages in a specified sum, sufficiently states a cause of action as against a general demurrer, and is not defective by reason of a failure to allege that the plaintiff had made a demand upon defendants for the property, and that there was a refusal on their part to comply with such demand.—*Daggett v. Gray*, 169.
2. EVIDENCE OF CONVERSION.—A demand and refusal do not of themselves constitute conversion, but are only evidence from which conversion in certain cases may be found; and a conversion may be established by proof of other acts on the part of a defendant concerning the property, and if the relation of the defendant to the property is such that a previous demand is essential in order to establish conversion, such demand must be proved at the trial, but need not be alleged.—*Id.*
3. GENERAL ALLEGATION OF CONVERSION.—Where conversion is alleged as a fact in general terms, it is sufficient to admit of any evidence on the trial that tends to establish such conversion, and the plaintiff is not bound to allege the particular act or acts which constitute the conversion.—*Id.*

## CORPORATIONS.

1. ASSESSMENT FOR UNPAID SHARES—LIABILITY OF TRANSFEREE OF STOCK.—One who purchases unpaid stock in a corporation, and causes a transfer thereof to himself to be entered upon the books of the corporation, is substituted for the original subscriber

## CORPORATIONS (Continued).

of the stock as a stockholder of the corporation, and thereafter holds the stock on the same conditions and subject to the same obligations as the original stockholder prior to the transfer; and he is liable for an assessment upon the unpaid shares, of which liability he cannot divest himself by an assignment of the shares subsequent to the levy of the assessment.—*Visalia & Tulare Railroad Co., v. Hyde*, 632.

2. **LIABILITY FOR ASSESSMENT DETERMINED BY BOOKS.**—For the purpose of ascertaining those who are liable to the corporation for the amount of an assessment, the corporation may look only to the list of stockholders as their names are registered upon its books.—*Id.*
3. **DEFENSE TO ASSESSMENT—TIME OF INCURRING OF LIABILITY—SUFFICIENCY OF PROPERTY OF CORPORATION—DISCRETION OF DIRECTORS.**—It is no defense to an action to recover the amount of an assessment that it is required to meet outstanding obligations which were contracted before the defendant became a stockholder, nor is it any defense that the corporation has sufficient property with which to meet its obligations; but the liability of the stockholder for the unpaid portion of a subscription rests upon the contract of subscription, and the propriety or necessity of requiring him to pay it, for the purpose of meeting the corporate liabilities, rather than to resort to property in the hands of the corporation to meet such liabilities, is in the discretion of the board of directors.—*Id.*
4. **INTEREST OF STOCKHOLDERS.**—A stockholder in a private corporation for profit is not in any proper sense the owner of the property of the corporation; but he has a direct interest in the corporation, and a right to participate according to the amount of his stock in the surplus profits on a division, and ultimately, on its dissolution, in the assets remaining after payment of its debts.—*Richter v. Henningsan*, 530.
5. **TAX UPON DISTILLERY BUSINESS—LIABILITY OF STOCKHOLDERS—CONTRIBUTION.**—Under the law of Congress, the stockholders of a corporation engaged in the use of a distillery are all jointly and severally liable for the tax imposed upon the corporation under section 3241 of the Revised Statutes, and, being jointly and severally liable for such tax, are liable to contribute their proportion to other stockholders, who have paid the tax in full for which all are liable.—*Id.*
6. **SALARY OF PRESIDENT—RATIFICATION OF ILLEGAL RESOLUTION.**—Where a resolution adopted by the board of directors of a corporation, and spread upon its records, on its face purports to be an authentic and efficient act of the corporation fixing the salary of the president at a specified sum, but is rendered illegal by the fact that though the president was one of the board of directors, and his vote was essential to its adoption, he was personally disqualified from voting thereon, such resolution may be ratified, confirmed, and adopted by a subsequently elected board of directors, of which the president is not a member; and such ratification has the effect to validate the original resolution; and for the purpose of justifying the president in taking the salary is to be construed with the same effect as if the original resolution had been properly adopted.—*Wickersham v. Crittenden*, 332.



## CORPORATIONS (Continued).

7. ACTION BY STOCKHOLDER—DEFENSE—ESTOPPEL OF CORPORATION.—An action brought by a stockholder to recover money paid to the president of the corporation on account of salary is brought for the account of the corporation, and not for the individual benefit of the stockholder; and whatever would have estopped the corporation from recovering a judgment against its president is equally a defense against the action by the stockholder.—*Id.*

See MECHANIC'S LIENS, 5; MUTUAL BENEFIT SOCIETY; PLEDGE; RECEIVER; SUMMONS, 5.

COSTS. See APPEAL, 14, 15; INJUNCTION, 6; JUDGMENT, 13.

## COUNTY.

1. CONSTRUCTION OF COUNTY GOVERNMENT ACT—CLAIMS AGAINST COUNTY—PROVINCE OF SUPERVISORS—DUTY OF AUDITOR—CERTIFICATE OF COUNTY CLERK.—The provision of section 41 of the County Government Act requiring a claim presented to the board of supervisors to be itemized, "giving names, dates, and particular services rendered," before it can be allowed, is directed to the board of supervisors alone, and there is no provision in the act giving the auditor a revisory control over their action; but the auditor is in duty bound to draw his warrant in favor of every person whose claim has been legally examined, allowed, and ordered to be paid by the board of supervisors; and the provisions of sections 45 and 114 of the act do not justify him in withholding a warrant merely because the clerk has not certified the items of the claim, or the liability for which it was allowed; but it is his duty in such case to ascertain by inquiry the nature of the liability in order to distinctly specify it in the warrant, and that the claim has been allowed and ordered paid by the board of supervisors, and, upon receiving such information from the county clerk, it is his duty to draw the warrant.—*Sehorn v. Williams*, 621.
2. CLAIM AGAINST COUNTY—PREMATURE SUIT—PARTIAL REJECTION OF CLAIM—FINAL ACTION OF SUPERVISORS—CONSTRUCTION OF COUNTY GOVERNMENT ACT.—Under sections 43 and 44 of the County Government Act, where the supervisors have allowed a portion of a claim presented, and rejected the remainder, the claimant, if dissatisfied with the rejection of the claim in part, is required to indicate to the supervisors his unwillingness to accept the amount allowed, and to give them an opportunity to again consider his claim for final action at the next regular succeeding session of the board, and a suit brought by the claimant before such final action is had by the supervisors upon the claim, is premature, and cannot be sustained.—*Arbios v. County of San Bernardino*, 553.

See SURVEY.

## COURTS.

1. DEPARTMENTS OF SUPERIOR COURT—JURISDICTION—TRANSFER OF CASE—CONSTITUTIONAL LAW.—The jurisdiction of causes is vested by the constitution in the superior court and not in any particular judge or department thereof, although it provides that there may be as many sessions of the court at the same time as there are judges, yet, whether sitting separately or together, the judges

## COURTS (Continued).

hold but one and the same court, and the division into departments is purely imaginary, and for the conveniences of business and of designation; and transferring a cause from one department to another does not effect a change or transfer of the jurisdiction, which remains at all times in the court as a single entity.—*White v. Superior Court*, 60.

2. **POWER OF PRESIDING JUDGE—RULES—RETRANSFER.**—The fact that rules adopted by the judges of the superior court of the city and county of San Francisco are violated by the presiding judge cannot affect his power to distribute the business of the court among the judges thereof, or affect the jurisdiction of the court over any cause assigned to any department; nor is the power of the presiding judge exhausted by the original assignment of an action or proceeding, but a cause may be reassigned or transferred, even irregularly, without jeopardizing the jurisdiction of the court.—*Id.*
3. **CONFLICT OF JURISDICTION—PRIORITY—IDENTITY OF TRIBUNAL.**—The rule that the judgment of a court which first acquires jurisdiction of the subject matter of a cause of action and of the parties thereto, will prevail over the judgment of another court whose jurisdiction was subsequently acquired, rests upon comity and the necessity of avoiding a conflict in the execution of judgments rendered by independent courts of distinct or concurrent jurisdiction; but this rule has no application to a case where the actions are brought in the same court and the judgments are rendered by the same tribunal.—*Brown v. Campbell*, 644.
4. **SUPERIOR COURT OF SAN FRANCISCO—DEPARTMENTS—IDENTITY OF JURISDICTION.**—There is but one superior court in the city and county of San Francisco, and all of the actions brought in that court are within the same jurisdiction, and the entire procedure from the commencement of the action to the execution of the judgment is in one court; and the jurisdiction over a cause, after it has been assigned by the presiding judge to one of the judges of the other departments of the court, remains in the same court, and neither the judge to whom it has been assigned, nor the department over which he presides, has any jurisdiction distinct from that of the court in which the action is pending.—*Id.*

See JUSTICE'S COURT; POLICE COURTS; SUPERIOR COURT.

## CRIMINAL LAW.

1. **BRIBERY—SUFFICIENCY OF INDICTMENT.**—An indictment charging a defendant with willfully and feloniously giving a bribe to a member of a board of supervisors, with intent to corruptly influence him in a certain matter, but not containing any averment of any act or acts bringing the alleged conduct within the legal meaning of bribery, and not stating the particular circumstances of the offense charged, is insufficient, and a demurrer thereto should be sustained.—*People v. Ward*, 369.
2. **AVERMENT OF BRIBERY—CONCLUSION OF LAW.**—A general averment in an indictment that the defendant bribed a certain person to do a certain thing is the averment of a legal conclusion only.—*Id.*

## CRIMINAL LAW (Continued).

3. FOLLOWING LANGUAGE OF STATUTE—EXCEPTION TO RULE—CIRCUMSTANCES CONSTITUTING OFFENSE.—The general rule that an indictment is sufficient if it substantially follows the language of the statute prohibiting the offense charged does not apply to a case where particular circumstances of the offense are necessary to constitute a complete offense, but only applies when such statute defines or describes the acts which constitute the particular offense; and it is not sufficient to follow the general words of section 165 of the Penal Code, providing that "every person who gives or offers a bribe" to one of several officers named, etc., is punishable in a certain manner; but it is essential that the acts constituting the bribe, as defined in subdivision 6 of section 7 of the Penal Code, be specified with reasonable certainty, so as to enable the defendant to answer the specific charge described in section 7, as constituting the offense of bribery.—*Id.*
4. BURGLARY—PRIOR CONVICTION—PLEA—EVIDENCE—ADMISSIONS OF DEFENDANT.—Where a defendant, accused of burglary and of a prior conviction of burglary, pleads guilty to the prior conviction, and not guilty as to the offense charged, it is the intent of the code, in such case, to keep all information from the jury as to the previous conviction; and the plea of guilty thereof is only intended for the information of the court in determining the punishment to be imposed in case of conviction; and it is prejudicial error to admit evidence of declarations of the defendant that he had served a term in the state's prison under the prior conviction.—*People v. Thomas*, 41.
5. FORGERY BY INDIANS—ORDER FOR INTOXICATING LIQUOR.—A forged order for the delivery of intoxicating liquor to bearer is, upon its face, capable of being used to defraud those who may act upon it as genuine, and is within the statute against forgery; and the fact that the defendants accused of the forgery are Indians and that the furnishing of intoxicating liquor to Indians is positively prohibited by law and made a felony, does not prevent the order from being the subject of forgery; and the fact that it was presented and passed by the defendants is a false factor as to its being the subject of forgery, and the defendants may be properly convicted of the forgery.—*People v. James*, 155.
6. CONTRACT—TEST OF FORGERY.—A writing which is a *nudum pactum* is not the subject of forgery; but the test of the forgery of a contract is whether, upon its face, it may have the effect to defraud those who may act upon it as genuine, or the person in whose name it is forged, and it is immaterial whether or not it covers a subject matter which makes it void as against public policy, or whether or not it possesses the legal requisites of negotiable paper or of an order, or whether or not the person in whose name it purports to be made has the legal capacity to make it, or whether or not the person to whom it is directed is bound to act upon it if genuine, or has a remedy over.—*Id.*
7. VARIANCE IN NAME OF PERSON TO BE DEFRAUDED—IDEM SONANS.—Where the forged order is signed Frank "Crushes," and the information alleges that it was forged with intent to defraud one Frank "Crusius," there is no material variance or difference in the names within the doctrine of *idem sonans*; and a demurrer to the information on account of such variance is properly overruled.—*Id.*

## CRIMINAL LAW (Continued).

8. **GRAND LARCENY—CIRCUMSTANTIAL EVIDENCE—CONFLICT—PROVINCE OF JURY.**—Where there was sufficient circumstantial evidence adduced by the prosecution to authorize the jury to believe in the guilt of a defendant accused of grand larceny, the fact that the evidence on behalf of the defendant tended to account for the money found in his possession, and to rebut the suspicious circumstances, only raised a conflict in the evidence which it was the province of the jury to determine.—*People v. Wong Chung Suey*, 117.
9. **IDENTIFICATION OF MONEY—SUFFICIENCY OF PROOF.**—The prosecution is not required definitely to identify the money found upon the person of the defendant as being that taken from the safe of the prosecuting witness; but if it is shown to be the same in amount and in the same coin and denomination, and that defendant was in a situation where he could have taken it, and there are other circumstances of a suspicious nature, the evidence is sufficient to go to the jury upon the question of identity of the money, and the sufficiency of the evidence to establish that fact is for the jury.—*Id.*
10. **PROVINCE OF JURY—CONCLUSIVENESS OF VERDICT.**—When there is any evidence legally tending to sustain a fact, the question whether it amounts to proof of that fact is for the jury, and their finding will not be disturbed upon appeal, unless the evidence preponderates so greatly against the verdict as to make it manifest that the verdict is the result of passion or prejudice.—*Id.*
11. **LARCENY—CONSPIRACY TO DEFRAUD—BUNCO GAME.**—Where the possession of the money of the prosecuting witness was obtained by a conspiracy on the part of the defendant and the manager of a lottery to cheat and defraud the prosecuting witness by what is known as the "bunco game," and it appears that the prosecuting witness did not intend to part with his property in the money, and that it was obtained from him by the grossest fraud, the defendant may be prosecuted and convicted of larceny therefor.—*People v. Shaughnessy*, 598.
12. **INSTRUCTIONS—READING OF CODE—FRAUDULENT OBTAINING OF MONEY.**—Instructions of the court must be read together as a whole, and where the court sufficiently instructs the jury as to the evidence required in order to convict the defendant of larceny under section 484 of the Penal Code, the fact that it reads to the jury section 332 of the Penal Code, in regard to the fraudulent obtaining of money by methods which do not necessarily constitute larceny, is not ground for a reversal of a judgment of conviction of larceny.—*Id.*
13. **VOLUNTARY CONFESSION—PRELIMINARY PROOF.**—Where a witness testifies to a confession made by the defendant under circumstances which show that it was impossible that there could have been an inducement offered by the witness to the defendant to make the confession, and the evidence further shows a motive of the defendant to make it, which was suggested by no one, and that his purpose was to enforce silence by a threat which immediately followed the confession, the failure of the court to institute a preliminary inquiry to determine whether the confession was voluntary before admitting it in evidence, is not prejudicial.—*People v. Kamannu*, 609.

## CRIMINAL LAW (Continued).

14. **MURDER IN THE FIRST DEGREE—PUNISHMENT—DISCRETION OF JURY—INSTRUCTION.**—Discretion is given to the jury in regard to the punishment in case they find a defendant guilty of murder in the first degree; and the court cannot direct or advise them upon the subject further than to inform them of their province; and it is not error to refuse to instruct them as to how they should use the discretion given them.—*Id.*
15. **IMPROPER LANGUAGE OF DISTRICT ATTORNEY—INSTRUCTION OF COURT.**—Where the district attorney makes improper reference to evidence offered and ruled out, if the court immediately instructs the jury that they have nothing to do with such evidence, and that the case must be determined entirely from the testimony received without reference to other things they may have heard, the improper remark of the district attorney, though deserving a rebuke from the court, is not ground for a reversal of the judgment of conviction.—*Id.*
16. **PROOF OF VENUE—RESIDENCE OF DECEASED.**—Where it is testified that the deceased resided in the county, and it is plainly implied that she resided at the house in front of which her body was found, and into which it was carried, the venue is sufficiently proved.—*Id.*

See INDUSTRIAL SCHOOL; JURY AND JURORS, 1-3; PUBLIC OFFICERS, 1-3.

## DAMAGES.

1. **NEGLIGENCE—ACTION FOR DEATH—EXCESSIVE DAMAGES.**—In an action for damages for the death of a wife and mother, prosecuted by her husband and minor children, a recovery of fourteen thousand dollars damage will not be disturbed upon appeal as excessive, where, after a careful review of the testimony, it cannot be said that the damage awarded by the jury appears to have been given under the influence of passion or prejudice.—*Redfield v. Oakland Consolidated Street Railway Co.*, 277.
2. **AMOUNT OF RECOVERY—POLICY OF OTHER STATES—ABSENCE OF STATUTORY RESTRICTION.**—Although there are statutory restrictions in other states limiting the amount of recovery in an action for death, such restrictions cannot be considered in this state; but section 377 of the Code of Civil Procedure having been enacted after such statutes were in existence, is a direct determination of the legislature of this state that the policy adopted by other states should not exist here.—*Id.*
3. **MEASURE OF DAMAGES—LIFE ANNUITY—PROVINCE OF JURY—RESTRICTION OF JUSTICE.**—The legislature has not declared the money value of a life annuity in favor of the deceased to be the measure of damages in an action for death, but has determined to leave the subject of the amount of damages at large, to be determined by the jury, with the single restriction that the damage allowed should be just, under all the circumstances of the case.—*Id.*
4. **REFUSAL OF INSTRUCTION—VALUE OF LIFE EXPECTANCY—OMISSION OF MATERIAL ELEMENTS.**—A proposed instruction asked by the defendant, to the effect that the jury should have awarded the present value to the plaintiffs of the principal of a life annuity in favor of the deceased wife and mother, was properly refused, without regard to whether such value is a correct measure of damages,

## DAMAGES (Continued).

upon the ground that the instruction failed to set forth, as limiting elements, the facts that the husband's life expectancy was less than that of the wife, and that as to him the value of the annuity upon the life of the deceased should only continue during his life expectancy; and that the value of the mother's life to the children becomes less, in law, upon their attaining majority; and that no evidence was given of the life expectancy of the minors.  
*Id.*

5. **PECUNIARY INTEREST OF ADULT CHILDREN IN LOSS OF MOTHER—INSTRUCTION.**—The statute does not limit the right to prosecute an action for death, or to recover damages, to minor children or minor heirs; and where the evidence tending to show an injury to the children, resulting from the loss of their mother, consisted of proof of her care and labor bestowed upon them, her education, her character, her ability to train and guide them, and her efforts for their welfare, the jury are authorized to draw such conclusions from the evidence as their intelligence, experience, and observation may justify; and it is not error for the court to instruct them that the pecuniary interest of children in the lives of their parents does not necessarily end with their arrival at the age of majority, but that they may allow for the probable loss of any benefit, if any, of a pecuniary value, which a child would probably receive from its mother after arrival at majority.—*Id.*
6. **EXCESSIVE DAMAGES—PASSION OR PREJUDICE.**—Before the appellate court can interfere on the ground of excessive damages, the verdict must be so plainly and outrageously excessive as to suggest, at the first blush, passion or prejudice on the part of the jury.—*Howland v. Oakland Consolidated Street Ry. Co.*, 513.

See **APPEAL**, 18; **INTEREST**, 6; **SALES**, 3, 8; **UNDUE INFLUENCE**, 1.

**DEBTOR AND CREDITOR.** See **ASSIGNMENT**; **INSOLVENCY**.

**DEED.**

1. **DEPOSIT OF DEED IN ESCROW—PAROL EVIDENCE OF CONDITIONS.**—In an action to foreclose the mortgage to which the son was a party, evidence is admissible to show that the mother executed to him a deed of the property prior to the mortgage, and placed it in the hands of another person as a depository, to be delivered after her death, and that the mortgagee had notice of the execution and deposit of the deed at the time he received his mortgage; and parol evidence is admissible to show all the facts and conditions upon which the deed was deposited.—*Wittenbrock v. Cass*, 1.
2. **VALIDITY OF DEED DELIVERED IN ESCROW—INTENTION OF GRANTOR—QUESTION OF FACT.**—The essential requisite to the validity of a deed transferred in escrow under such circumstances is, that when placed in the hands of a third party it has passed beyond the power of the grantor for all time, and that question is to be determined by the grantor's intention in the matter, and is a question of fact to be solved by the light of all the circumstances surrounding the transaction.—*Id.*

See **PLEADING**, 4; **RESTRAINT ON ALIENATION**; **TOWNSITE**; **VENDOR AND VENDEE**.

**WISTILLERY.** See **CORPORATIONS**, 5.

## DIVORCE.

1. **PERSONAL ACTION—ABATEMENT—DEATH AFTER JUDGMENT—JURISDICTION.**—An action to procure a judgment of divorce is a purely personal action, which cannot survive the death of either party, and where the plaintiff in such action dies subsequent to the entry of a judgment decreeing a divorce in her favor, the court is deprived of all power to review its action and determine her right to a divorce.—*Kirschner v. Dietrich*, 502.
2. **PUBLICATION OF SUMMONS—APPLICATION TO ANSWER TO MERITS—CONSTRUCTION OF CODE.**—The fact that the summons in the action for divorce was served by publication does not authorize the court to set aside a judgment of divorce, after the death of the plaintiff, to allow the defendant to answer to the merits of the action under section 473 of the Code of Civil Procedure, as that section has no application to a case in which by the death of the plaintiff the action is abated, and all opportunity of controverting its merits has been removed.—*Id.*
3. **QUESTION OF PROPERTY—ABSENCE OF ISSUE—JURISDICTION TO OPEN JUDGMENT—REVIEW.**—The court has no jurisdiction to open the judgment of divorce, for the determination of property rights between the plaintiff and the defendant, after the death of the plaintiff, where the complaint, as well as the judgment, is silent upon the subject of property; and, in such case, there being no issue upon that subject, the action cannot be revived, for the purpose of having the rights of property adjudicated.—*Id.*
4. **EFFECT OF DECREE—COMMUNITY PROPERTY—TENANCY IN COMMON—INDEPENDENT ACTION.**—In the absence of any issue as to property rights, or any reference thereto in the decree of divorce, the parties to the suit become tenants in common of the community property; and the death of the plaintiff after the entry of judgment does not impair the right of the defendant therein; but this right must be enforced in an independent action, in which all who may have an interest therein should be made parties, and it cannot be determined by reopening the decree of divorce subsequent to the death of the plaintiff.—*Id.*

See CERTIORARI, I, 3, 5.

## EASEMENT.

1. **WATER DITCH—SERVITUDE.**—A water ditch constituting an independent property disassociated from the land over which it passes, though it may be an easement in gross, is a servitude upon the land.—*Dixon v. Schermeier*, 582.
2. **UNITY OF TITLE—EXTINGUISHMENT OF SERVITUDE.**—When the owner of the land over which the ditch passes becomes the owner of the ditch, the servitude is extinguished by unity of title during the time that such unity of title may continue.—*Id.*
3. **DITCH APPURTENANT TO DISTINCT MINING CLAIMS.**—Where a ditch, as an artificial watercourse, is apparently necessary to the working of two distinct mining claims owned by the owner of the ditch, it becomes an appurtenance to each of the mining claims.—*Id.*
4. **MORTGAGE UPON ONE CLAIM—SEVERANCE OF TENEMENTS—EASEMENT OF WAY.**—The execution of a mortgage upon one of the two mining claims to which the water ditch is an appurtenance,

## EASEMENT (Continued).

creates, potentially, a severance of the tenements to which the ditch is appurtenant, and where the ditch crosses the mortgaged claim to the other mining claim to which the ditch is also appurtenant, and which is not included in the mortgage, an easement of way for the ditch over the mortgaged claim is reserved in the mortgage by implication of law in favor of the other mining claim.—*Id.*

5. **SUBSEQUENT MORTGAGE UPON EASEMENT—FORECLOSURE OF FIRST MORTGAGE—DISCLAIMER—EXTINGUISHMENT OF LIEN.**—A subsequent mortgage of the other mining claim covers the easement reserved by implication of law in the former mortgage; and in a suit to foreclose the former mortgage the subsequent mortgagee may assert a lien on the easement of way for the ditch over the first mortgaged claim; but by disclaiming any interest in the land which is the subject of that suit, the judgment of foreclosure of the prior mortgage founded on such disclaimer, and the sale and deed thereunder, extinguishes the lien of the subsequent mortgagee on every part of the first mortgaged claim, including the easement of way and the section of the ditch lying above that claim which, as an appurtenance thereof, was included in the disclaimer; and a purchaser at a sale under foreclosure of the second mortgage acquires no interest in the ditch beyond the boundary of the claim subsequently mortgaged.—*Id.*

See **WATER AND WATER RIGHTS, 2-4.**

**EQUITY.** See **ACCOUNTING; FINDINGS, 3, 4; GUARDIAN AND WARD; INJUNCTION; INTEREST, 1-3.**

**ESCROW.** See **DEED.**

**ESTATES OF DECEASED PERSONS.**

1. **PROCEEDING TO DETERMINE HEIRSHIP—ENTRY OF FINAL DECREE.**—The final order or decree, in a proceeding under section 1664 of the Code of Civil Procedure to determine heirship, is properly entered when spread at length upon the minute-book of the court in probate. It is not necessary that it should be entered in a judgment-book.—*Estate of Blythe, 226.*
2. **PROCEEDING TO DETERMINE HEIRSHIP—ENTRY OF FINAL DECREE.**—The final order or decree, in a proceeding under section 1664 of the Code of Civil Procedure to determine heirship, is properly entered when spread at length upon the minute-book of the court in probate. It is not necessary that it should be entered in a judgment-book.—*Estate of Blythe, 229.*
3. **DETERMINATION OF HEIRSHIP—PROCEEDING IN REM—CONSTRUCTION OF CODE.**—It seems that the proceeding and decree provided for in section 1664 of the Code of Civil Procedure were intended by the legislature to be *in rem*, and conclusive against all persons, and the unquestioned basis for the decree of distribution which was to follow.—*Estate of Blythe, 231.*
4. **DECREE OF DISTRIBUTION—CONTEST BY CLAIMANT—ADMISSIBILITY OF PROCEEDINGS TO DETERMINE HEIRSHIP.**—Where an heir who has instituted prior proceedings under section 1664 of the Code of



## ESTATES OF DECEASED PERSONS (Continued).

Civil Procedure petitions for a subsequent distribution of the property, and sets forth the proceedings as a basis for the decree, if a claimant who did not appear, and was not named in such proceedings, appears and contests the distribution, and joins issue upon the fact of such proceedings, the proceedings are admissible in evidence under the issues, in proof of the averments denied by the contesting claimant, without regard to the question of their conclusiveness.—*Id.*

5. **KINSHIP OF CLAIMANT—CONCLUSIVENESS OF FINDING.**—Where the finding of the superior court is against the kinship of the contesting claimant to the decedent, and to the effect that she has no interest in the estate, and the testimony in favor of the claimant is of an exceedingly slight and flimsy character, the conclusion of the trial judge will not be disturbed upon appeal, but it will be considered that she has no interest in the estate, and is not concerned with its distribution.—*Id.*
6. **PETITION TO REMOVE ADMINISTRATOR—EVIDENCE—DECLARATIONS OF DECEASED.**—Under a petition to remove an administrator upon the ground that the deceased had, at the time of his death, a large sum of money, which came into the possession of the administrator, or of which he had knowledge, which he failed to include in his inventory, evidence of declarations made by the deceased in respect to the value of his estate, and that he had a large sum of money in his house, is not admissible against the administrator, to prove the ownership or possession of the money.—*Estate of Welch*, 605.
7. **INTEREST IN PARTNERSHIP—TRANSFER BY DECEDENT—REMOVAL OF ADMINISTRATOR.**—Where the only evidence tending to show that the decedent owned an interest in a partnership with the administrator was the fact that, a few days before his death, he assigned his interest in it to his wife, and there are no grounds for attacking the transfer, the administrator cannot be removed for failing to show the partnership interest of the deceased in the inventory.—*Id.*
8. **IMPROPER PAYMENT OF ATTORNEY'S FEE.**—The fact that the administrator improperly paid an attorney's fee is no ground for his removal.—*Id.*
9. **CUSTODY OF ASSETS BY ADMINISTRATOR—POWER OF COURT—BOND OF ADMINISTRATOR.**—An administrator cannot be deprived of the actual custody of the assets of the estate by an order of the probate court directing him where and how he shall keep them; but the administrator is liable for their safety on his bond, and the court cannot lawfully take charge of the assets or deprive interested parties of the security of the bond.—*Id.*
10. **SUCCESSION—NEXT OF KIN OF DECEDENT—AUNTS AND UNCLES OF WHOLE BLOOD—CONSTRUCTION OF CODE.**—Under subdivision 6 of section 1386 of the Civil Code, which provides that "if the decedent leave neither issue, husband, wife, father, mother, brother, nor sister, the estate must go to the next of kin in equal degree," the next of kin in equal degree, in such case, are the aunts and uncles of the decedent, and, if they are of the whole blood, the estate must go to them in equal shares, regardless of the source from which the estate was derived.—*Estate of Pearsons*, 524.

## ESTATES OF DECEASED PERSONS (Continued).

11. **BLOOD OF FIRST PURCHASER APPLICABLE ONLY TO KINDRED OF HALF BLOOD.**—Section 1386 of the Civil Code has no allusion to the blood of the first purchaser, and makes no attempt at any distinction founded upon the sources from which the estate of the decedent may have been derived; and section 1394, which deals entirely with cases of kindred of the half blood, does not qualify or change the rule of section 1386, respecting kindred of the whole blood, who, if next of kin, share in all the estate of the decedent, no matter from what source it comes.—*Id.*
12. **ALLOWANCE OF ATTORNEY'S FEES—EXPERT WITNESSES—CONSENT OF HEIR.**—Upon the allowance of attorney's fees in the probate court for services rendered to the administrator of a decedent, although the evidence of attorneys is competent, the trial court is not bound to fix the amount of the fee in accordance with their opinions; and where the allowance made is less than the estimate of any expert witness who testified, and was consented to by the attorney for the sole heir interested in the estate, it will not be disturbed upon appeal.—*Freese v. Pennie*, 467.
13. **RIGHT OF ADMINISTRATION—COMPETENCY OF FATHER OF DECEASED—IMPROVIDENCE—QUESTION OF FACT.**—Where the competency of the father of a deceased person, who petitioned for letters of administration upon the estate of his son, was contested by the public administrator, by reason of the alleged improvidence of the father rendering him incompetent to serve as administrator, the question as to whether the petitioner was incompetent to serve as administrator by reason of his improvidence or not is a question of fact to be determined by the court below, in view of all the evidence before it; and where the evidence is substantially conflicting, and there is sufficient evidence to sustain a finding that the father was not improvident or incompetent, its determination cannot be disturbed on appeal upon mere technical grounds.—*Estate of Connors*, 408.
14. **NATURE OF IMPROVIDENCE.**—The improvidence which is a ground of exclusion of a relative of the deceased from administration is that want of care or foresight in the management of the property which would be likely to render the estate and effects of the intestate unsafe, or liable to be lost or diminished in value by improvidence, in case administration thereof should be committed to such improvident person.—*Id.*
15. **EVIDENCE—CHARACTER—GENERAL REPUTATION—TESTIMONY AS TO IMPROVIDENCE.**—Although, as a general rule, character can only be proved by general reputation, and cannot be shown by evidence of particular and specific facts, but may be proved by negative testimony, yet, where the testimony adduced as to the improvidence of the defendant not only assailed his general reputation for providence, industry, and sobriety, but stated that he squandered his money for liquor and contributed nothing to the support of his family, it is competent to meet and overcome such evidence by proof that he had accumulated property, was never intoxicated, had supported his wife and family while residing with him, had never squandered his money, and was known as an honest, sober, and industrious man, and always paid his bills.—*Id.*
16. **CONTEST OF ADMINISTRATION—FAILURE TO MAKE FINDINGS—IMMATERIAL OMISSION.**—Conceding without deciding that upon a contest

## ESTATES OF DECEASED PERSONS (Continued).

for the right of administration of the estate of a deceased person findings are necessary, an appellant is not aggrieved by the failure of the court to make findings where it is apparent that the court must have believed the witnesses for the respondent, and that if any findings had been made, they must have been adverse to the appellant.—*Id.*

17. ACCOUNTS OF EXECUTOR—NECESSARY REPAIRS AND IMPROVEMENTS.—Although, as a general rule, executors and administrators are not required nor permitted to make permanent improvements upon the property of the estate in their charge, in the way of erecting new buildings and structures, yet that rule does not apply where repairs and improvements are absolutely necessary to keep the premises in good tenable condition, and the improvements are rendered necessary by the requirements of a city ordinance over which the executrix has no control, and were made in good faith to the increase of the value of the property; and, in such case, the executrix should be allowed for the repairs and improvements upon the real estate belonging to the estate.—*Estate of Clos*, 494.
18. PRINCIPLE OF EQUITY—REASONABLE EXPENDITURES BY EXECUTOR.—Where the estate has received the full benefit of expenditures, which have been reasonably made by an executrix, it is inequitable to hold that the executrix is not entitled to reimbursement; and the acts of an executor or executrix in the administration of the trust are to be adjudged according to the rules and principles of equity.—*Id.*
19. PERMISSION OF COURT—ALLOWANCE OF ACCOUNT.—Although it is better practice for an executor first to procure the permission of the probate court to make a needed improvement, before proceeding thereto, yet this is not an indispensable condition to the allowance of the demand in the settlement of the executor's account, where it appears that the expenditures were just and reasonable, and were made in the interest of the estate.—*Id.*
20. COMMISSIONS OF EXECUTOR—VALUE OF LITIGATED LAND NOT BELONGING TO ESTATE.—An executor cannot be allowed a claim for commissions upon lands, though included in the inventory of the estate, which were at that time involved in litigation, wherein a final judgment was subsequently rendered adverse to the estate.—*Estate of Delaney*, 563.
21. ADDITIONAL ALLOWANCE.—The commissions which the statute authorizes to be allowed an executor is the compensation fixed by law for his care of the property belonging to the estate, and the court is not authorized to make any additional allowance, without a petition therefor showing the rendition of extraordinary services.—*Id.*
22. EXCESS OF CLAIM LESS THAN THREE HUNDRED DOLLARS—APPELLATE JURISDICTION—ORDER SETTLING EXECUTOR'S ACCOUNT.—The fact that the share of the commissions in excess of the amount which should have been allowed is less than three hundred dollars cannot defeat the appellate jurisdiction of the supreme court, which has jurisdiction in all such probate matters as may be provided by law, and is authorized to entertain an appeal from an order settling the account of an executor, irrespective of the amount involved.—*Id.*

## ESTATES OF DECEASED PERSONS (Continued).

23. **APPEALABLE ORDERS—ORDER SETTTLING ACCOUNT—DECREE OF DISTRIBUTION—UNION OF ORDERS.**—An order settling an account, as well as a decree of distribution, is appealable, and the right of appeal from either of these orders is not affected by the fact that both of the orders were made at the same time, and included in the same paper under one signature of the judge.—*Id.*
24. **DISMISSAL—SERVICE OF NOTICE OF APPEAL.**—The appeal from the order settling the account will not be dismissed because the notice of appeal therefrom was not served upon any other party than the executor; and where the order settling the account is reversed, it necessarily vacates the decree of distribution, and, in such case, the appeal from the decree will not be dismissed for failure to serve the notice of appeal upon one of the distributees named in the decree of distribution.—*Id.*
25. **INVALID SALE OF LAND—ORDER FOR AUCTION—PRIVATE SALE—CONFIRMATION—WANT OF JURISDICTION.**—Where the land of a deceased person is ordered to be sold at auction, and the return of the sale made by the executor shows that the land was sold at private sale, and not at public sale, as directed in the order of sale, the sale is void on the face of the record, and the court has no power to confirm it.—*Schlicker v. Hemenway*, 579.
26. **DEPOSIT OF PURCHASE MONEY WITH EXECUTOR—REPRESENTATIVE CAPACITY—LIABILITY OF ESTATE.**—A deposit on account of purchase money with the executor by the purchaser at such void sale is not received by the executor in his representative capacity, he having no right to demand or receive it; and the estate is not liable to the purchaser for a return of the deposit unless it be shown that it has been actually made a part of the assets of the estate, through being accounted for to the estate, or actually used for its benefit.—*Id.*
27. **ACTION TO RECOVER DEPOSIT—MISJOINDER OF PARTIES AND CAUSES OF ACTION—AMBIGUITY AND UNCERTAINTY.**—Where an action is brought to recover the deposited purchase money paid to the executor, against the executor individually, and also as executor of the estate, the complaint is demurrable on the ground of misjoinder of parties and of causes of action, and, where it does not show clearly whether it is sought to charge the executor personally or the estate, or both of them jointly, it is demurrable for ambiguity and uncertainty; and it is also demurrable upon the ground that it does not state a cause of action against the defendant as representative of the estate.—*Id.*

See ACCOUNTING, 1-4; APPEAL, 12, 13; MORTGAGE, 6, 7; PLEADING, 5; STATUTE OF LIMITATIONS, 4; TRUST, 2, 4; WILLS.

**ESTOPPEL.** See CORPORATIONS, 7; SALE, 1.

**EVIDENCE.**

1. **RESULT OF INJURIES—TESTIMONY OF PHYSICIANS—OPINION.**—Where a physician who treated the plaintiff for injuries caused by the collision of the street railway cars, and who subsequently attended plaintiff at the time of a miscarriage, testified that the miscarriage was, in his judgment, produced as the result of the injuries, a question asked of another physician who

## EVIDENCE (Continued).

had been called in consultation too late to note personally the immediate character of the injuries, as to whether, assuming the statement of the other physician to be true, and the character of the injuries described by him to have been inflicted by a collision of the street cars, what, in his judgment, was the cause of the condition that he observed, does not improperly call for the opinion of one expert based upon that of another expert, but simply calls for the opinion of the witness as to the inducing cause of the condition in which he found the patient when called in, assuming the injuries to have been as described.—*Howland v. O. C. S. Ry. Co.*, 513.

2. **EXPERT EVIDENCE—HYPOTHETICAL QUESTION—GENERAL OBJECTION—WAIVER OF SPECIFIC OBJECTIONS.**—An objection to a hypothetical question asked of a physician in the general form that it is irrelevant, immaterial, and incompetent, and not a proper hypothetical question, is insufficient to call the court's attention to the mere specific objections that the question calls for the opinion of one expert based upon that of another, and that it should have contained a statement of the facts calling for the opinion; and the party making such general objections will not be permitted to avail himself upon appeal of specific objections which were not made in the court below.—*Id.*
3. **STATEMENT OF TESTIMONY HEARD BY EXPERT WITNESS.**—It seems that where an expert witness has heard a statement of facts testified to by another witness, it is sufficient, in putting to him a hypothetical question, to direct his attention to the testimony heard as the basis upon which his opinion is desired, without repeating the testimony.—*Id.*
4. **QUALIFICATION OF EXPERT WITNESS—DISCRETION OF TRIAL JUDGE.**—The qualification of an expert witness to answer a hypothetical question calling for his opinion is a question largely for the determination of the trial judge, and his ruling will not be disturbed unless error clearly appears; and, where the witness disclosed a sufficient knowledge of the subject to entitle his opinion to go to the jury, the question of the degree of his knowledge goes more to the weight of the evidence than to its admissibility.—*Id.*
5. **OPINION EVIDENCE AS TO RUNNING OF ELECTRIC CARS.**—The manner of running electric cars, their rate of speed, and the facility with which they can be stopped or handled, is a proper subject for expert evidence, and not a matter of such common knowledge that the jury can judge as intelligently as one skilled in their use.—*Id.*
6. **RIGHT OF WAY BETWEEN STREET RAILWAY COMPANIES—EVIDENCE OF CUSTOM.**—Where the plaintiff was injured by the collision of two street railway companies, both of which were joined as defendants charged with negligence, the court may admit evidence, in behalf of one of the street railway companies, as to the custom between such companies of giving the older company the right of way at crossings, as tending to show the jury that the other defendant was guilty of the more culpable negligence.—*Id.*
7. **OFFER OF EVIDENCE—IMPROPER METHOD—PRESUMPTION OF CONSENT—ERRONEOUS RULING.**—Although a mere general offer of evidence to prove a variety of things, without producing the witnesses or evidence whereby they are to be proved, is an improper method of presenting offered evidence, yet, where no objection is made to the form of the offer upon the ground that the offer was an im-

## EVIDENCE (Continued).

proper method, but objection is only taken to the evidence offered, it will be presumed upon appeal that the method used in making the offer was by consent; and, if the evidence offered is improperly rejected, the judgment will be reversed for the erroneous ruling.—*Biddick v. Kobler*, 191.

8. **ACTION UPON NOTE—DEFENSE—WARRANTY—SPECIAL AGREEMENT—BURDEN OF PROOF—NONSUIT.**—In an action upon a note, where the answer pleaded that it was given in part payment for a harvester, which was warranted to do good work, and that, subsequent to its execution, it was agreed between the parties that the note should remain until the next harvest, and that the harvester should be put in order to do good work, otherwise the note was to be returned and the contract of purchase rescinded, and alleged that the harvester was not put in order, and that the note was demanded by the defendant, which demand was not complied with, etc., the burden of proof is upon the defendant to prove the new matter alleged in the answer, and the contract pleaded in the answer is not admissible in evidence upon cross-examination of the plaintiffs; and it is error to grant a nonsuit because of mere proof of the contract, in the absence of proof either that the next harvest had not arrived, or that that plaintiffs had been given an opportunity to put the machine in order, and had failed to do so.—*Haines v. Snedigar*, 18.
9. **ORDER OF PROOF—CROSS-EXAMINATION OF PLAINTIFFS—INADMISSIBLE EVIDENCE FOR DEFENDANT.**—The defendant is not entitled to offer proof of affirmative matter set up in his answer, until plaintiffs have made their case, and submitted it to the court; and proof of the execution of an agreement relied upon in defense to a note in suit is not proper in cross-examination of the plaintiffs, and its admission in evidence, upon such cross-examination, is error.—*Id.*
10. **ACTION FOR ASSAULT AND BATTERY—GENERAL REPUTATION OF DEFENDANT.**—In a civil action for assault and battery, evidence of the general reputation of the defendant for peace and quiet is not admissible.—*Vance v. Richardson*, 414.
11. **GENERAL RULE IN CIVIL ACTIONS—EVIDENCE OF GOOD CHARACTER—EXCEPTIONS.**—The general rule is that, in civil actions, evidence of the good character of the defendant is not admissible, and the exceptions consist mostly of cases where the character of some person is the very issue involved; but an action for assault and battery is not one of the exceptions.—*Id.*
12. **EVIDENCE OF CONVERSATION—EXAMINATION IN CHIEF.**—The rule that upon cross-examination the whole of a conversation may be brought out in regard to which there has been any evidence in chief does not authorize a party whose witness is testifying in chief to ask the witness to state the whole of a conversation, which may involve a mass of matter not relevant; and a refusal of the court to permit such statement is not prejudicial, as the party has the right to call the attention of the witness to any further relevant declarations.—*Id.*

See **BILL OF PARTICULARS**; **BOUNDARIES**; **CONVERSION**, 2, 3; **CRIMINAL LAW**, 4, 8, 10, 13; **DEED**, 1; **ESTATES OF DECEASED PERSONS**, 4, 6, 7, 12, 13, 15; **INSURANCE**, 3; **MUTUAL BENEFIT SOCIETY**, 1; **NEGLIGENCE**, 17, 24; **NEW TRIAL**, 3, 4; **ROADS AND HIGHWAYS**, 3-8; **SALE**, 2, 3; **TOWNSITE**; **WAGER**; **WILLS**, 7-11.

## EXECUTION.

1. **CONSTABLE'S SALE—RETURN OF PURCHASE MONEY—LIABILITY OF SURETIES UPON BOND.**—Upon a constable's sale of real estate the constable cannot impeach his return as to the amount of money received by him for the property, and he and the sureties upon his official bond are liable for the full amount returned as having been received, although he did not receive the money in fact, but accepted a check for a large part of the money which was never paid.—*Meherin v. Saunders*, 463.
2. **BID BY PURCHASER FOR JUDGMENT CREDITOR—DEFENSE NOT PLEADED.** The constable and his sureties cannot rely upon the fact that the purchase was made by the purchaser as the agent for the judgment creditor, with the understanding that only enough was to be paid to satisfy the executions held by the constable, where no such defense is pleaded in the answer, and there is no offer to amend the pleadings to present such defense.—*Id.*

See **APPEAL**, 19-21; **JUDGMENT**, 9.

**EXECUTORS AND ADMINISTRATORS. See ESTATES OF DECEASED PERSONS.**

## FINDINGS.

1. **ACTION UPON NOTES—DENIAL OF CONSIDERATION—PLEA OF SPECIAL AGREEMENTS.**—In an action upon several promissory notes, where the court finds that they were executed by the defendant in consideration of a loan by plaintiff to the defendant, and that no part of the principal or interest due on the notes has been paid, the findings sufficiently cover issues raised by the answer as to want of consideration of the notes, and by plea of special agreements to the effect that, as to one of them, he was not to be obliged to pay it until he should be able, and that, as to another, it was given with the understanding that a joint maker with him was the person that was to pay that note.—*Giletti v. Saracco*, 428.
2. **FAILURE TO FIND UPON ISSUES—WANT OF EVIDENCE.**—A failure to find upon issues, a finding upon which would merely have the effect of invalidating a judgment fully supported by the findings made, will not be held ground for reversal, where it is not shown by statement or bill of exceptions that evidence was submitted in relation to such issues.—*Id.*
3. **EQUITY CASE—FINDINGS ADVISORY—INSTRUCTIONS.**—An action to enjoin a nuisance is a case in equity, and the verdict of a jury in such a case is merely advisory to the court; and if instructions given to the jury are erroneous, such error is not ground for reversing the judgment, the correctness of the decision of the court, and not the propositions of law it laid down for the guidance of the jury, being the only question for determination upon appeal.—*Richardson v. Eureka*, 441.
4. **EXPRESS FINDINGS—WAIVER—PRESUMPTION UPON APPEAL.**—Express findings by the court are necessary in an equity action, unless they are waived; but the absence of such findings in the record is not a fatal defect, unless it affirmatively appears that they were not waived.—*Id.*
5. **AGREED STATEMENT OF FACTS.**—Where the court, in the decision of a case, adopts the facts stipulated by the parties in an agreed

## FINDINGS (Continued).

statement, as the facts of the case, and bases its judgment thereon, such agreed statement takes the place and serves all the purposes of a formal finding by the court; and no other or more formal findings are required.—*Muller v. Rowell*, 318.

6. AGREED STATEMENT EQUIVALENT TO ADMISSIONS IN PLEADINGS.—Where the parties stipulate in writing as to what the facts are, and file such stipulation in the action, it is in all substantial respects the equivalent of admitting them in the pleadings; and it is only where the facts are in issue that findings thereon by the court are necessary in any case.—*Id.*
7. DEFAULT—WAIVER OF FINDINGS.—Defendants who make default and fail to appear at the trial waive findings.—*Hibernia Sav. & L. Soc. v. Clarke*, 27.
8. SUFFICIENCY OF FINDINGS—RECITALS IN DECREE.—Recitals in the decree may constitute sufficient findings where findings are required.—*Id.*
9. IMMATERIAL OMISSION.—A failure to find upon a plea of the statute of limitations is not material where the other facts found are sufficient to support the judgment, and are not assailed for insufficiency of evidence.—*Richter v. Henningson*, 530.
10. PRACTICE—ADDITION TO FINDINGS—CONCLUSION OF LAW—IMMATERIAL ERROR.—After the findings have been filed, and a judgment entered thereupon, the court cannot properly cause to be filed an omitted finding upon the statute of limitations; and the judgment should not be reversed upon that ground where a finding upon that issue is but a conclusion of law from the other facts found.—*Id.*

See ESTATES OF DECEASED PERSONS, 5, 16; JUDGMENTS, 2, 3; MECHANICS' LIENS, 2; MORTGAGE, 9; NEW TRIAL, 5; STREET ASSESSMENT, 8, 16.

FORFEITURE. See LANDLORD AND TENANT, 1-3.

FORGERY. See CRIMINAL LAW, 5-7.

FRAUD. See INSOLVENCY, 1-4; SALE, 5; STATUTE OF LIMITATIONS, 5-9; STREET ASSESSMENT, 11; UNDUE INFLUENCE; VENDOR AND VENDEE, 1.

GAMING. See WAGER.

GIFT. See RESTRAINT ON ALIENATION.

GOODWILL. See SALE, 1-8.

GRANTOR AND GRANTEE. See DEED; STATUTE OF LIMITATIONS, 5-9; VENDOR AND VENDEE.

GUARDIAN AND WARD.

1. GUARDIANSHIP—SETTLEMENT OF ACCOUNTS OF MOTHER WITH MINORS—ADULT CHILD IMPROPERLY INCLUDED—UNPROFITABLE INVESTMENT—SALE PROCURED BY ADULT CHILD—DIFFERENT MODES OF ACCOUNTING.—Where the estate of a decedent was distributed one-half to his widow, and the other half to the three minor children,



## GUARDIAN AND WARD (Continued).

and the widow, as mother of the minor children, without letters of guardianship, took charge of the persons and estates of the minors, and with the money belonging to the minors purchased real estate for their benefit in good faith, which was afterward sold at a loss, upon the settlement of a subsequent legal guardianship of two of the minor children, the other child being an adult daughter, for whom no guardian was ever appointed, and who had become of age before the property was sold and who had brought an action for partition and procured the sale thereof, and voluntarily accepted her share of the proceeds of the sale, and who was not a formal party to the accounting with the two minor children, should not be included in the accounting with them, and any accounting had with her should be settled upon a different basis from the accounting with them, she not being entitled to be credited, as are the minors, with one-third of the original sum received from the estate of their father with interest thereon, but only with her one-third of the proceeds of the sale; and no items of credit or charges to her should appear in the accounting with the minor children.—*Estates of Beisel*, 267.

2. ALLOWANCE TO MOTHER AS QUASI GUARDIAN—MAINTENANCE OF MINORS—EXPENDITURES—TRUST—ACCOUNTING IN EQUITY.—Where the mother of minor children has acted in good faith for their benefit without letters of guardianship, she is chargeable in equity as a *quasi* guardian, or trustee of their estates, and an accounting and settlement of such trust, after the issuance of letters of guardianship, is in the nature of an accounting in equity, to be determined upon equitable principles; and the court has jurisdiction in such accounting to allow reasonable and proper credits to her for maintenance of the minor children, and for expenditures incurred on their account, prior to the letters of guardianship.—*Id.*
3. ALLOWANCE OUT OF PROPERTY OF MINOR—INCOME—PRINCIPAL.—A court of equity will allow all reasonable payments for the maintenance and education of an infant made by the person in whose hands his property is held, out of the income of the property, if his father is dead or unable to support him; and where the income is insufficient for his maintenance and education, equity will break into the principal.—*Id.*
4. ALLOWANCE TO MOTHER FOR PAST MAINTENANCE—SEPARATE ESTATE—CRITERION.—A mother will be allowed in equity for the past maintenance of her children, from the death of the father, out of the estate of the children, though she has a separate estate; and the criterion for determining whether a past maintenance should be allowed to her is whether a chancery court would have authorized it in advance.—*Id.*
5. ACCOUNTING OF TRUST—STATUTE OF LIMITATIONS.—In the accounting and settlement of a voluntary trust with the mother as *quasi* guardian of minor children, the expenditures made by her for the benefit of the children must be deemed in equity as having been made out of their funds, and as constituting an equitable offset to the liability of the trustee who could not plead the statute of limitations in defense to the liability; and it cannot be objected that an allowance for their maintenance and for expenditures incurred for them prior to letters of guardianship is barred by the statute of limitations.—*Id.*

## GUARDIAN AND WARD (Continued).

6. DISCRETION AS TO AMOUNT OF ALLOWANCE.—The amount of an allowance for maintenance of minor children is in the discretion of the court, and will not be disturbed upon appeal where no abuse of discretion appears.—*Id.*
7. PRIOR ALLOWANCE DURING LEGAL GUARDIANSHIP—FURTHER ALLOWANCE UPON ACCOUNTING OF TRUST.—The fact that there was an allowance during the existence of a legal guardianship, out of the money in the hands of the guardian, for the support of the minor children by the mother, does not preclude a further allowance to her upon an accounting by her of her trust during the preceding years in which she is charged with the principal sum received by her as the children's share of the estate of their deceased father, with interest thereon.—*Id.*
8. EXPENDITURES UPON REAL ESTATE OF MINORS.—Where the minors are credited in the account of the *quasi* guardianship with their full share of the rents of real estate belonging to them, they are justly chargeable with their proportion of the expenditures incurred by their mother, in good faith, in the improvement of the property, and in the payment of necessary expense for taxes, insurance, and repairs.—*Id.*
9. ALLOWANCE OF ATTORNEY'S FEES—DISCRETION.—The allowance of a reasonable amount of attorney's fees to the mother of the children is within the discretion of the court.—*Id.*
10. PROBATE COURT—ACCOUNTING OF TRUST IN EQUITY—JURISDICTION—WAIVER OF OBJECTION.—Where the accounts of the mother as *quasi* guardian of the children prior to the letters of guardianship are settled in the probate court, and all objections to its jurisdiction are expressly waived at the hearing, although the account was entitled in the matter of the guardianship of the estates of the minors, the accounting is in its nature an accounting in equity by the mother of the minors as trustee of their estates, and will be upheld and treated as such upon appeal.—*Id.*
11. SETTLEMENT OF ACCOUNTS OF MOTHER WITH MINORS.—In the settlement of the accounts of the mother with the minors each minor should be credited with his share of the principal of the moneys received by the mother, and interest thereon, and also with his share of the proceeds of the sale of personal property, and of the rents of the real estate, and the mother should be credited with the share of each minor in the whole expense incurred by her in respect of his proportionate share, and with his share of the allowance made by the court for the support of the minors, both prior and subsequent to the guardianship, and with his proper share of attorney's fees allowed by the court, and she should also be credited with the sum paid to the guardian of each minor on account of proceeds of the sale of the house and lot in which she had invested the funds of the minors, and any payments made by her to the estate of the minors.—*Id.*

See NEGLIGENCE, 1-4.

HABEAS CORPUS. See CONTEMPT, 6; INDUSTRIAL SCHOOL, 1; JURY AND JURORS, 2, 3.

HIGHWAYS. See ROADS AND HIGHWAYS.

HOLIDAY. See INSURANCE, 8.

### HOMESTEAD.

1. **TENANCY IN COMMON—SUBSEQUENT CONVEYANCE OF TITLE.**—A homestead cannot be created upon land held in cotenancy, in favor of one of the cotenants, and where a homestead is declared upon land so held, it is invalid, and cannot become a homestead by a subsequent conveyance from the other cotenant.—*Rosenthal v. Merced Bank*, 198.
2. **INVALID DECLARATION OF HOMESTEAD—CONVEYANCE BY HUSBAND.**—Where a declaration of homestead is invalid by reason of a cotenancy existing at the time of the declaration, the title of the husband in the community property is not thereby affected, and can be conveyed by a deed from himself alone, without acknowledgment.—*Id.*
3. **QUIETING TITLE—HUSBAND AND WIFE—SEPARATE PROPERTY OF WIFE—PARTIES—JOINT TENANCY.**—In an action to quiet title brought by a wife, in respect of her separate property, the husband is not a necessary party, although a homestead had been declared upon the premises for the joint benefit of herself and her husband; and it is immaterial whether the homestead be considered as creating a joint tenancy or not, the wife being permitted to sue alone for the enforcement or protection of any right which she may have in her separate property, even if the right be that of a joint tenant only.—*Prey v. Stanley*, 423.

### HUSBAND AND WIFE.

1. **ANTENUPTIAL SETTLEMENT—FALSE REPRESENTATIONS AS TO CHARACTER OF WIFE—VALIDITY OF SETTLEMENT.**—An antenuptial settlement, made in contemplation of marriage, is based upon a sufficient consideration, and where the marriage has been consummated, and the relation of husband and wife has been maintained for several years, the antenuptial settlement cannot be set aside upon the ground that the wife personally, and by her friends and agents, falsely represented that she was a virtuous, worthy, chaste, and moral woman, whereas she was in fact a woman of unchaste and immoral character.—*Barnes v. Barnes*, 418.
2. **VALIDITY OF MARRIAGE—PREVIOUS UNCHASTE CONDUCT—PUBLIC POLICY—MAXIM.**—Previous unchaste conduct, although concealed, does not invalidate a marriage; but public policy opens marriage as the gateway for repentance and virtue, and the maxim *caveat emptor* governs in regard to a marriage settlement.—*Id.*
3. **MISJOINDER OF PARTIES AND CAUSES OF ACTION—WAIVER.**—In an action for the recovery of damages for injuries done to the wife, the husband and wife are necessary parties; but where the husband has a separate cause of action for consequential damages to him for his wife's injuries the wife is neither a necessary nor a proper party, and the two causes of action cannot properly be joined; but, if they are joined, and the defendant fails to demur for the misjoinder, he is conclusively deemed to have waived the objection, and cannot object to evidence of the husband's necessary disbursements for physicians and nurses attending his wife, in proof of the allegations of the complaint.—*McKinne v. S. C. V. M. & L. Co.*, 436.

See DIVORCE; HOMESTEAD; NEGLIGENCE, 1, 2.

INDIANS. See CRIMINAL LAW, 5.

### INDUSTRIAL SCHOOL.

1. CONSTITUTIONAL LAW—PRESTON SCHOOL OF INDUSTRY—DETENTION AND EDUCATION OF MINOR OFFENDERS.—The act of March 11, 1889, establishing the Preston School of Industry is constitutional, the legislature having the power to provide for the detention and education of minor offenders; and the fact that the term of detention is made greater by the judgment of the court than the term of the longest imprisonment in the county jail allowed for the same offense does not render the act invalid; nor can it be said that the punishment inflicted is greater than can be put upon an adult for the same offense, the object of the act being not punishment, but reformation, discipline, and education, and to afford the juvenile offender the opportunity and instruction to learn a trade, and to qualify himself for the duties of citizenship.—*Ex parte Nichols*, 651.
2. HABEAS CORPUS—COMMITMENT FOR PETIT LARCENY—JURISDICTION OF JUSTICE'S COURT—FELONY—TRANSFER OF BOYS FROM STATE PRISON.—A juvenile offender sentenced by the justice's court for petit larceny to the Preston School of Industry until he is twenty-one years of age is not punished as for a felony beyond the jurisdiction of the justice's court; and the fact that the act provides that any boy under eighteen years of age who is serving a sentence in any state prison, who shall be deemed a fit subject for training in said school, may, upon the recommendation of the board of prison directors and the approval of the governor, be transferred to said school, and, when honorably discharged therefrom, shall be entitled to such benefits and immunities as are provided for other inmates thereof, does not turn the school into a state prison, but such transfer is in effect a commutation by the governor, and an offender sentenced by the justice's court cannot be released upon *habeas corpus* upon the ground that such transfer may be made from the state prison.—*Id.*

INFANTS. See GUARDIAN AND WARD.

### INJUNCTION.

1. ACTION ON BOND—COUNSEL FEES AND EXPENSES OF SUIT.—The liability of the sureties upon an injunction bond is measured by the terms of their contract; and where the damages are limited by the terms of the bond to such as the plaintiff may sustain by reason of the injunction, whatever expenses he is subjected to by reason of the suit, or for counsel fees in defending the suit, are not damages within the terms of the bond.—*Curtiss v. Bachman*, 433.
2. COUNSEL FEES, WHEN ALLOWED.—Counsel fees incurred by defendant by reason of a preliminary injunction are part of the damages for which he has a right to indemnity; but only such counsel fees as may be incurred after the injunction has been issued, and prior to the determination of the action, can be considered as within the rule, and services of counsel rendered in the trial of the cause are not a portion of the damages sustained by reason of the injunction.—*Id.*
3. SERVICES OF COUNSEL BEFORE ISSUANCE OF INJUNCTION.—Services of counsel employed to resist a motion for an injunction rendered

## INJUNCTION (Continued).

- by virtue of an order to show cause why the injunction should not be granted, are not rendered by reason of the injunction, and cannot be recovered in an action upon the injunction bond.—*Id.*
4. **UNSUCCESSFUL MOTION TO DISSOLVE AN INJUNCTION.**—An unsuccessful motion to dissolve an injunction does not authorize a recovery for the expense of counsel fees in making the motion, unless the court suspends its decision on the motion until the hearing of the case.—*Id.*
  5. **PRELIMINARY INJUNCTION—EFFECT OF FAILURE TO SUSTAIN ACTION—WAIVER OF DAMAGES.**—It does not follow that because the plaintiff failed to sustain his action at the trial a preliminary injunction was not properly issued; and if, instead of seeking a dissolution of the preliminary injunction, the defendant prefers to defeat the plaintiff in his action, he waives his right to recover from the sureties any damages that he may sustain by reason of the issuance of the preliminary injunction.—*Id.*
  6. **COSTS.**—Costs incurred upon the trial of the action, and upon appeal from the judgment are not within the terms of an injunction bond given for a preliminary injunction.—*Id.*
  7. **LOSS OF TIME—INJURY TO BUSINESS.**—The loss of defendant's time and the injury to his business resulting from the litigation are outside of the undertaking of the sureties upon the injunction bond.—*Id.*

See NUISANCE, 1, 3; RECEIVER, 2, 7.

## INSOLVENCY.

1. **PETITION OF CREDITORS—SUFFICIENCY OF PLEADING—FRAUDULENT TRANSFER.**—Under section 8 of the Insolvent Act, which prescribes what facts the petition of creditors against an insolvent debtor shall set forth, a petition alleging a transfer of the property of the insolvent with intent to hinder, delay, and defraud his creditors, and setting forth the name of the grantee, with the circumstances of time, place, and general description of the property sold, is sufficient, and is not demurrable because the allegations of fraud are not made more specific; and where the petition also alleges that the respondent, being insolvent, and in contemplation of insolvency, sold and conveyed a stock of merchandise, in the petition described, it sufficiently states an act of insolvency on the part of the respondent, entitling the creditors to an adjudication of his insolvency.—*Matter of Patton*, 33.
2. **TRANSFER OUT OF USUAL COURSE OF BUSINESS—PRESUMPTION OF FRAUD—REBUTTAL—CONFLICTING EVIDENCE.**—In an action by an assignee in insolvency to recover merchandise transferred by the insolvent to the defendant, the fact that the transfers were not made in the ordinary course of business of the insolvent renders them *prima facie* fraudulent; but the presumption of fraud is subject to rebuttal, and where there was evidence on behalf of the defendant which tended to show that he had no information of the insolvent condition of the grantor, and that the prices paid and agreed to be paid were the full and fair value of the property purchased, and that he has offered to make deferred payments to the assignee, such evidence, if believed, is sufficient to rebut the presumption of fraud; and where the evidence is conflicting,

## INSOLVENCY (Continued).

the credence to be allowed to the evidence for the defendant is for the trial court to determine, and a decision by the trial court that the defendant made his purchases in good faith and without fraudulent intent, and for a sufficient consideration, will not be disturbed upon appeal—*Grunsky v. Parlin*, 179.

3. **FRAUDULENT INTENT OF VENDOR—OMISSION TO FIND.**—Where the findings exonerate the vendee of the charge of fraud, the intent of the vendor becomes immaterial, and an omission to find as to whether the insolvent was guilty of a fraudulent intent in the transfer to the vendee is not an omission to dispose of a material issue.—*Id.*
4. **FRAUD OF SELLER—INNOCENT PURCHASER.**—A transfer by an insolvent debtor cannot be vacated because of the fraud of the seller in which the purchaser had no part, and of which he had no notice.—*Id.*
5. **PARTNERSHIP—SUFFICIENCY OF PETITION—JURISDICTION.**—Although a petition in insolvency by partners does not directly allege that the petitioners are partners, the absence of such direct allegation is not jurisdictional where the fact sufficiently appears that they are partners, taking the petition as a whole.—*Matter of Ramassina*, 488.
6. **APPEAL BY CREDITOR FROM ADJUDICATION—SUFFICIENCY OF PLEADING.**—Upon appeal by a creditor from an adjudication in insolvency upon petition of insolvent partners, any crudities or bad grammar used by the petitioner are not fatal to the jurisdiction, and will not vitiate the pleading.—*Id.*
7. **SHOWING OF INSOLVENCY—VALUATION OF PARTNERSHIP ASSETS—EXCESS OF PARTNERSHIP ASSETS OVER LIABILITIES.**—The fact that it appears from the petition that the valuation of the partnership assets exceed the liabilities of the partnership, does not prove the solvency of the copartners at the time of the filing of the petition; and where the petition discloses that the partners individually are hopelessly insolvent and unable to pay the debts and liabilities of the partnership, the petition sufficiently discloses insolvency within the purview of the Insolvent Act.—*Id.*
8. **DEBTOR, WHEN INSOLVENT.**—A debtor is insolvent when he is unable to pay his debts from his own means as they become due.—*Id.*

See CONTEMPT, 8; JUDGMENT, 2; LANDLORD AND TENANT, 1.

## INSTRUCTIONS.

1. **EVIDENCE STRICKEN OUT—DUTY OF DEFENDANT.**—If the defendant desires specific instructions as to the effect of evidence stricken out, he should ask for them.—*People v. Kamaunu*, 609.
2. **CONFLICTING INSTRUCTIONS—ABSENCE OF EXCEPTION—ERROR IN FAVOR OF APPELLANT.**—Where the court gives conflicting instructions, and there is no exception to the instructions objected to as erroneous, and it appears that the only error in the conflicting instructions was in favor of the appellant, the conflict is no ground for reversal.—*Williams v. Southern Pac. R. R. Co.*, 457.
3. **GENERAL EXCEPTION.**—A general exception to each and all of the instructions given by the court of its own motion is not sufficient to authorize a review of the instructions so given.—*Cavallaro v. Texas etc. Ry. Co.*, 348.
4. **EXCEPTION TO SPECIAL INSTRUCTIONS.**—The rule that a general objection to instructions as not sufficient has no application to

## INSTRUCTIONS (Continued).

special instructions asked by the parties, and given or refused by the court, concerning which a general exception is sufficient.—*Id.*

See APPEAL, 3; CRIMINAL LAW, 12, 14, 15; DAMAGES, 4, 5; FINDINGS, 3; SLANDER.

## INSURANCE.

1. LIFE INSURANCE—POLICY PAYABLE TO LEGAL HEIRS—POWER TO CHANGE BENEFICIARIES.—A person who procures a policy upon his life payable to a designated beneficiary, although he pays the premiums himself and keeps the policy in his exclusive possession, has no power to change the beneficiary unless the policy itself or the charter of the insurance company so provides; and this doctrine is applicable to a case in which the designated beneficiaries are the legal heirs of the person effecting the insurance.—*Yore v. Booth*, 238.
2. RIGHTS OF BENEFICIARIES—VESTED INTEREST.—A beneficiary named or described in the policy of life insurance, although parting with nothing and simply the object of another's bounty, has a vested and irrevocable interest in the policy, which he may keep alive for his own benefit by paying the premiums or assessments, if the person who effected the insurance fails or refuses to do so.—*Id.*
3. ACTION UPON POLICY—DECLARATIONS OF DECEASED—HEARSAY.—In an action upon a policy of insurance, brought by the beneficiaries, after the death of the insured person, any declarations of the deceased, not made at the time of procuring the policy, or as part of the *res gestae*, are hearsay and incompetent evidence.—*Id.*
- 4.—STATEMENT AS TO AGE—PRESUMPTION—CONFLICTING STATEMENT.—A statement in the application for the policy as to the age of the insured is presumed to be true; and any different or contradictory statement as to his age in applications for other policies, or at other times, are hearsay, and cannot overcome such presumption.—*Id.*
5. APPLICATION FOR ANOTHER POLICY—SIGNATURE FOR WIDOW.—An application for a different policy from the one in suit, signed by the husband, in the name of the widow, and not by her in person, although it would be competent evidence against her in an action upon the policy issued thereon, is not competent evidence in favor of another insurance company sued upon the policy in controversy, to show a different statement of the age of the insured, in the absence of proof that she was actually cognizant of the facts and statements made in the other policy.—*Id.*
6. LIFE INSURANCE—MATURITY OF ASSESSMENT—CONSTRUCTION OF POLICY.—The language of a policy of life insurance is to be construed most strongly against the insurer; and a premium or assessment which is payable during a specified month is presumed to be payable upon the last day of the month, in the absence of anything more definite in the policy fixing the day or date of maturity of the obligation.—*Northey v. Bankers' Life Association*, 547.
7. NOTICE OF ASSESSMENT—TIME OF PAYMENT.—A notice that an assessment must be paid during the month of April is, in effect, a notice that the insured would have to and including the last day of April in which to make the payment.—*Id.*

## INSURANCE (Continued).

8. **EFFECT OF HOLIDAY—DEATH UPON FOLLOWING DAY—NONPAYMENT OF ASSESSMENT—FORFEITURE.**—Where the last day of the month upon which an assessment or premium is to fall due is a holiday, the assured has all of the first day of the following month in which to make the payment; and if the insured person dies on that day, the policy is not forfeited for nonpayment, under a provision that membership shall cease upon failure of the assured to make any payment due from him to the association at its maturity in specified months, and the amount of the policy may be recovered by the assured from the life association.—*Id.*

See **MUTUAL BENEFIT SOCIETY.**

## INTEREST.

1. **MORTGAGE BY DEED ABSOLUTE—REDEMPTION—EXCESSIVE INTEREST—EQUITABLE RELIEF.**—In order to redeem from a deed absolute in form, which was intended as a mortgage, the mortgagor must pay the rate of interest agreed upon in the note which was given for the indebtedness secured by the deed, although such interest is largely in excess of the current rates prevailing at the date of the note, and equity can grant no relief against such interest because merely of the excessive rate, in the absence of proof of other circumstances tending to show actual fraud, or oppression and overreaching, warranting the inference of undue advantage.—*Boyce v. Fisk*, 107.
2. **CONTRACT FOR INTEREST—EQUITY BOUND BY THE LAW.**—In this state parties may agree in any contract in writing for the payment of any rate of interest, and it must be allowed, according to the terms of the agreement, until the entry of judgment, and courts of equity are as much bound by the laws of the land as courts of law.—*Id.*
3. **HARD BARGAIN.**—The fact that a bargain is a very hard or unreasonable one is not sufficient *per se* to induce a court of equity to interfere with the contract.—*Id.*
4. **LANDLORD AND TENANT—LEASE—APPRAISEMENT OF BUILDING—FAILURE OF APPRAISERS TO AGREE—APPLICATION TO COURT—CONTRACT FOR INTEREST.**—Where a lease provided for the erection of a building by the lessee, and for payment by the lessor of two-thirds of the appraised value of the building at the expiration of the term, and that the amount of the appraisement should bear interest at the rate of two per cent per month, compounding monthly until paid, and should be a lien and encumbrance upon the premises, and there was a failure of an appraisement through no fault of the lessor, but by reason of the appraisers failing to agree upon the value or upon a third party to complete the appraisement, and the lessor subsequently applied to the court for an appraisement of the building, after the expiration of the term of lease, the lessor is not chargeable with the conventional rate of interest from the date of the expiration of the term, but is only chargeable with interest from the date of the determination of the suit for appraisement by the court.—*Easterbrook v. Farquharson*, 311.
5. **CONSTRUCTION OF LEASE—LIABILITY OF LESSOR—TENDER.**—The lease in such case should be construed as intended to prevent default on the part of the lessor, and to insure a prompt performance of the conditions of the lease; and where there was no default



## INTEREST (Continued).

of the lessor, and he was unable to pay any appraised value at the expiration of the lease, or to make any tender thereof, he is not chargeable with the stipulated interest from the expiration of the lease to the entry of judgment in an action to secure a judicial appraisalment.—*Id.*

6. **INTEREST AS DAMAGES—COMPENSATION FOR WRONG—CERTAINTY—CONSTRUCTION OF CODE.**—Interest cannot be allowed as damages, under the Civil Code, except as compensation for the unlawful act or omission of another, and in cases where the damages are certain or capable of being made certain by calculation, and the right of recovery is vested upon a particular day.—*Id.*
7. **SETTLEMENT OF ACCOUNT—ALLOWANCE OF INTEREST.**—Where a plaintiff comes into court seeking a settlement of an account with the defendant, the sum allowed bears interest only from the day of its judicial ascertainment, under section 1917 of the Civil Code.—*Id.*
8. **DELAY OF ACTION—FAILURE OF LESSEE.**—Where the lessee failed to avail himself of the right to a speedy determination and payment, by appealing to the court for an appraisalment, his failure to do so cannot be urged as a ground for an award of interest in an action which the lessor was finally compelled to bring against him, though such action was not instituted until six months after the expiration of the lease.—*Id.*

See MORTGAGE, 15.

## JUDGMENT.

1. **TRUST—LIMITATION OF TIME IN DECREE OF ENFORCEMENT—CESSATION OF RIGHT.**—In an action to enforce a trust and to compel a conveyance, the court may fix a limitation in the decree of enforcement, within which money must be paid or tendered as a condition of the conveyance, and may provide that, in default of payment or tender made on or before a day fixed in the decree, all the right, title, and interest of the plaintiff shall cease and be at an end, and that thereafter neither of the defendants shall be held as a trustee in respect to any of the matters mentioned in the decree, and the parties may be concluded by such limitation.—*Cosby v. Superior Court*, 45.
  2. **JUDGMENT AGAINST ASSIGNEE OF INSOLVENT—PAYMENT TO ASSIGNOR OF CLAIMANT—FINDING OF FACT AMONG CONCLUSIONS OF LAW—CONCLUSIVENESS UPON APPEAL.**—Where judgment was rendered against an assignee for the benefit of creditors of an insolvent stockbroker, in favor of an intervening creditor, for the difference between the amount realized by the assignee from the sale of stocks belonging to the intervenor's assignor, and a sum of money deducted therefrom on account of moneys received by such assignor, the finding that such sum was to be deducted from such amount is a finding of fact, although placed after the conclusions of law; and, in the absence of the evidence presented thereon in a statement or bill of exceptions, such finding of fact is conclusive upon appeal.—*Knowlton v. Mackenzie*, 183.
- UNAUTHORIZED MODIFICATION OF JUDGMENT.**—After the court has rendered judgment in accordance with its findings, neither the findings nor the judgment can be changed except through a motion for a new trial, or upon appeal, and the court loses all

## JUDGMENT (Continued).

power to change its findings of fact after the entry of judgment, in the absence of a motion for a new trial, and has no power, in the absence of such motion, to modify the judgment drawn from the findings of fact as made.—*Id.*

4. **STIPULATION FOR MODIFICATION OF JUDGMENT—STATEMENT OF ATTORNEY.**—Where some of the parties to the action stipulated for a modification of the judgment, but the attorney for the appellant expressly refused to sign any stipulation, and merely verbally expressed the willingness of his client to obey the order of the court, such statement is not the equivalent of a stipulation, and does not prevent his client from objecting upon appeal to the want of authority in the court to modify the judgment.—*Id.*
5. **DEFENSES—PENDENCY OF PRIOR ACTION—ESTOPPEL OF FORMER JUDGMENT—PLEADING.**—In an action brought in the superior court of the city and county of San Francisco, if the defense of a prior action pending in another department of the same court, for the same cause, or of the estoppel of a former judgment rendered therein, is not pleaded when such defense is available to the defendant, he cannot, after an adverse judgment, avail himself of such defenses.—*Brown v. Campbell*, 644.
6. **ISSUE OF PRIOR ACTION PENDING—ABATEMENT.**—Upon a plea of a prior action pending for the same cause, if the issue is tried and found against the plaintiff the judgment of the court should be that the action should abate, and the rights of the parties must be determined by the judgment in the former action.—*Id.*
7. **PLEA OF FORMER JUDGMENT—TIME FOR APPEAL—PRACTICE—PLEADING.**—Where a judgment is ineffectual as evidenced under a plea of a former adjudication, until the time for an appeal therefrom has expired, the true course of the defendant in such case is to plead the pendency of the former action in abatement until the judgment therein becomes final, when the judgment may be pleaded in bar of the action by supplemental answer.—*Id.*
8. **EFFECT OF JUDGMENT IN PRIOR ACTION PENDING—CONTINUANCE—DISMISSAL OF SECOND ACTION.**—If a judgment rendered in a prior action for the same cause has not become final, the pendency of the prior action after judgment is a good ground for the continuance of the subsequent action until the final determination of the former action, or would be a sufficient basis for an order dismissing the subsequent action upon motion of plaintiff.—*Id.*
9. **DOUBLE JUDGMENT AGAINST STAKEHOLDERS—FAILURE TO SUSTAIN DEFENSE—STAY OF EXECUTION UPON SECOND JUDGMENT.**—Where stakeholders, instead of paying the money into court for purposes of interpleader, abandon their position as stakeholders and defend against the right of one of the parties to receive any of the money, they cannot claim the consideration due to a stakeholder, and if, in two separate actions against them, judgment is rendered in favor of each of the claimants of the money, in the absence of any plea of a prior action pending for the same cause, they are in the position of a litigant who has failed to sustain his defense, and cannot obtain an order in the second action setting aside the judgment or granting a perpetual stay of execution thereon on account of a former judgment in favor of the other claimant rendered in a prior action between the same parties.—*Id.*

## JUDGMENT (Continued).

10. **TORTS—DAMAGE BY BROKEN SEWER—SATISFACTION OF JUDGMENT AGAINST CITY—EXTINGUISHMENT OF JUDGMENT AGAINST SUPERINTENDENT OF STREETS.**—Where judgment was obtained against the city and county of San Francisco, in an action to recover for damages caused by a broken sewer, owing to the negligence of the city properly to repair the same, and subsequent to the recovery of such judgment, and before satisfaction thereof another judgment was obtained against the superintendent of streets and his deputies, for the same injury, upon a complaint charging them with the making of repairs in such a negligent manner as directly to conduce to the injury complained of, after which there was a satisfaction of the judgment against the city, the judgment against the superintendent of streets and his deputies is thereby extinguished, excepting as to the costs of action, and the defendants in that action are entitled to an order restraining and enjoining the plaintiff from issuing or enforcing execution thereunder, and that the judgment against them be ordered satisfied of record.—*Butler v. Ashworth*, 614.
11. **JOINT TORT-FEASORS—ONLY ONE SATISFACTION ALLOWABLE.**—There can be but one satisfaction accorded for the same wrong; and if several persons are guilty in common of a tort, though the injured one may at his election sue them individually or together, he cannot, by suing each wrongdoer alone, secure more than one compensation for the same injury; and if he sue one alone, and is paid damages for the wrong, his remedy is at an end, and he is barred from further recovery against the others.—*Id.*
12. **NATURE OF ACTS CAUSING SINGLE INJURY.**—Where the injury caused is single, it is immaterial whether it was caused by the joint or several acts of the tort-feasor, and the plaintiff can be but once compensated for the injury suffered.—*Id.*
13. **CONTRIBUTION TO INJURY—SEVERAL ACTS OF TORT-FEASORS—COSTS OF SEPARATE SUIT.**—Where several acts of tort-feasors contribute to the same injury, there can be but one satisfaction in damages therefor; yet if the acts are not joint, in such a sense as will make the doers of them liable to be sued in a common action as joint tort-feasors, the case is not within section 1023 of the Code of Civil Procedure, which prevents the recovery of costs in more than one action where the defendants sued separately might have been joined as defendants in the same action; and in such case, where the judgment and costs against one of the wrongdoers has been paid and satisfied, though the judgment for damages against the other wrongdoers is also satisfied and extinguished thereby, yet the plaintiff is entitled to recover the costs of a separate action against the other wrongdoers.—*Id.*

See APPEAL, 4-6, 8, 11, 13, 16; ATTORNEY AND CLIENT; CERTIORARI, 1, 3, 4; CONTEMPT, 1, 3-5; COURTS, 3, 4; DIVORCE, 1-4; ESTATES OF DECEASED PERSONS, 1, 2; MARRIED WOMEN; MORTGAGE, 9, 10, 12; NEGLIGENCE, 4; PARTNERSHIP, 1-3; STATUTE OF LIMITATIONS, 3; STREET ASSESSMENT, 16.

**JURISDICTION.** See APPEAL, 14, 15; CERTIORARI; CONTEMPT, 1-5; COURTS; DIVORCE, 1, 3; ESTATES OF DECEASED PERSONS, 25;

## JURISDICTION (Continued).

INDUSTRIAL SCHOOL, 1; JURY AND JURORS, 2; JUSTICE'S COURT, 2-4; MUTUAL BENEFIT SOCIETY, 2, 4; PARTNERSHIP, 4; PROHIBITION; RECEIVER, 1-3.

## JURY AND JURORS.

1. CRIMINAL LAW—TRIAL BY JURY—POLICE COURT—VAGRANCY.—The legislature may provide for summary proceedings in the police court, without a jury, in cases of such petty offenses as were thus provided for in certain early English statutes, and in cases which are intrinsically of a similar nature and degree, and vagrancy is one of such offenses, for a summary trial of which without a jury the legislature might provide by a general law.—*In re Fife*, 8.
2. RIGHT TO JURY TRIAL—ERROR—APPEAL—JURISDICTION—HABEAS CORPUS.—There is no valid statutory provision for a trial of a case of vagrancy without a jury; but the denial of a trial by jury in such a case in the police court is merely error to be corrected on appeal, and does not go to the jurisdiction of the court, and cannot be inquired into on *habeas corpus*.—*Id.*
3. WAIVER OF JURY TRIAL—REVIEW UPON HABEAS CORPUS.—A jury trial may be waived in any civil case and in all criminal cases not amounting to a felony; and in any case in which a jury trial may be waived, and in which a jury trial is not a necessary constituent part of the court, the refusal of the court to allow a jury is mere error, and cannot be reviewed upon *habeas corpus*.—*Id.*
4. JURY TRIAL—RIGHT OF PEREMPTORY CHALLENGE—WAIVER.—It is proper practice to have twelve jurors in the box before requiring the parties to exercise their peremptory challenges, and then to call another juror whenever a peremptory challenge shall have been exercised; and then the parties are to challenge alternately, and if one of them does not exercise his right of challenge in his turn, after the other party has expressed his satisfaction with the full panel, he cannot afterward be allowed another peremptory challenge.—*Vance v. Richardson*, 414.

## JUSTICE'S COURT.

1. RULES OF PLEADING—PROOFS—JUDGMENT.—However liberal the rules of pleading may be in a justice's court, the complaint must state the cause of action relied upon, and in that, as in every court, the allegations and proofs must correspond, and the judgment must be upon the demand and within the pleadings.—*Terry v. Superior Court*, 85.
2. HUSBANDS AS PARTIES—APPEAL—SERVICE OF NOTICE—JURISDICTION OF SUPERIOR COURT.—In an action in the justice's court to enforce an *assumpsit* for services rendered at the special instance and request of married women, where the judgment rendered is not in terms against their husbands or the community property, but, in contemplation of the pleadings, is a judgment whose satisfaction can only be had from the separate property of the wives, the husbands are not parties adverse to their wives upon an appeal taken by the wives to the superior court; and the notice of appeal need not be served upon them as adverse parties in order to give jurisdiction to the superior court of the appeal, and its

## JUSTICE'S COURT (Continued).

jurisdiction to determine the appeal cannot be restrained by writ of prohibition for want of such service.—*Id.*

3. ACTION IN JUSTICE'S COURT—LOSS OF ANIMALS—NEGLECT OF RAILWAY COMPANY TO FENCE TRACK—ISSUE AS TO OWNERSHIP OF LAND—APPELLATE JURISDICTION.—The supreme court has appellate jurisdiction of an action brought in the justice's court to recover the value of domestic animals killed upon the owner's land by the cars and engine of a railway corporation which has neglected to fence its track, though the animals are of less value than three hundred dollars, if the defendant first filed a verified answer putting in issue the allegation of the complaint as to the ownership of the land, and the case is thereupon certified to the superior court for trial, as one involving the title to real estate; and it appearing that the ownership or possession of the land is a condition precedent to recovery, the fact that the defendant, by his appeal to the supreme court from the judgment of the superior court, or from the order denying a motion for a new trial, raises no question as to the matters giving jurisdiction to the supreme court, is not material to its jurisdiction, and a motion to dismiss the appeal, for want of jurisdiction, must be denied.—*Baker v. Southern California Ry. Co.*, 455.
4. JURISDICTION—COUNTERCLAIM.—In an action in the superior court arising upon contract, a counterclaim arising upon a different contract from that pleaded by the plaintiff, not set up as a defense but as a ground for an affirmative judgment against the plaintiff, is not within the jurisdiction of the superior court where the amount of the counterclaim is less than three hundred dollars, and any action thereupon must be by independent suit in the justice's court.—*Griswold v. Pieratt*, 259.

See APPEAL, 14, 15; INDUSTRIAL SCHOOL.

LACHES. See ACCOUNTING, 2, 5; STATUTE OF LIMITATIONS, 8.

## LANDLORD AND TENANT.

1. LEASE—ASSIGNMENT—COVENANT BY JOINT LESSEES—INSOLVENCY OF ONE LESSEE—FORFEITURE.—A covenant by two joint lessees of land not to assign the lease or permit any assignment thereof to be made by bankruptcy or otherwise, without the written consent of the lessor, is not broken, so as to incur a forfeiture of the lease, by an adjudication and assignment in insolvency by one of the lessees of his interest in the lease, to which the other lessee is not a party, and which he could not have prevented.—*Randol v. Scott*, 590.
2. CONSTRUCTION OF COVENANT—CONDITION INVOLVING FORFEITURE.—A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created, and to prevent the restraint from going beyond the express stipulation; and a covenant by the lessees not to assign the lease must be presumed to mean that the lease should not be assigned by the joint act of the lessees.—*Id.*
3. CULTIVATION IN HUSBANDLIKE MANNER—BREACH OF COVENANT—WAIVER OF OBJECTION.—Under a covenant that the land shall be continuously cultivated in a good and husbandlike manner, and

## LANDLORD AND TENANT (Continued).

kept clear of other growth, except that the lessees may raise squash or pumpkins between the peach trees during the first two years of their growth, the planting of corn, beans, and nursery trees over a very small part of the land is too trivial a matter to warrant a forfeiture of the lease, where the lessor had a right to inspect the premises, and to be informed of the condition of the land and trees and of the performance by the lessees of their covenants, and made no objection to what was done by the lessees.—*Id.*

4. **FAILURE TO REPAIR—POSSESSION BY TENANT—UNLAWFUL DETAINER.** Under section 1942 of the Civil Code a tenant of a dwelling-house who has failed to make necessary repairs or to vacate the premises, and who has remained in possession after rent became due, cannot, in an action of unlawful detainer by the landlord, set up his failure to make the repairs either as a defense to the action or as an offset to the rent.—*Moroney v. Hellings*, 219.

See **INTEREST**, 4, 5, 8.

**LARCENY.** See **CRIMINAL LAW**, 8, 9, 11, 12.

**LEASE.** See **LANDLORD AND TENANT**.

**LIFE INSURANCE.** See **INSURANCE**.

**MANDAMUS.** See **MUTUAL BENEFIT SOCIETY**, 3.

**MARRIAGE.** See **HUSBAND AND WIFE**, 1, 2.

**MARRIED WOMEN.**

**ACTION AGAINST MARRIED WOMEN—ASSUMPSIT—STATUTORY OBLIGATION—PLEADING—JUDGMENT.**—An action against married women upon a contract for services rendered by undertakers in the burial of their father at their instance and request is an action of *assumpsit* to enforce a voluntary agreement, and not to enforce a statutory obligation against the wives under section 292 of the Penal Code, if no facts are stated in the complaint respecting such statutory obligation; and the judgment in such action can bind only the wives and their separate property.—*Terry v. Superior Court*, 85.

See **SALE**, 1, 2.

**MASTER AND SERVANT.** See **NEGLIGENCE**, 7, 23-25.

**MEASURE OF DAMAGES.** See **DAMAGES**.

**MECHANICS' LIENS.**

1. **CLAIM OF MATERIALMAN—PLEADING—VARIANCE.**—In an action to foreclose the lien of a materialman, in which the complaint alleges that a balance of the contract price is still in the hands of the owner of the building, and bases a right of recovery upon that ground only, the plaintiff cannot recover upon proof of the mere assumption by the owner of a debt of the contractor, or his agreement to pay such debt, which would not carry

## MECHANICS' LIENS (Continued).

- or create a right of lien, and which is not alleged in the complaint, and there can be no recovery against the owner, where the court finds as a fact that he had paid out more than the contract price of the building prior to the commencement of the action, and owed the contractor nothing.—*Gibson v. Wheeler*, 242.
2. **MATERIALS FURNISHED TO OWNER NOT PLEADED—FINDING OUTSIDE OF ISSUES.**—Where the complaint alleges only that materials were furnished to the contractor, the court cannot enforce a lien against the owner upon proof that materials were bought by the owner directly from the plaintiffs, and were used in the construction of the building, nor adjudge the recovery of a lien for the amount of materials thus bought; and a finding of any contract with the owner not pleaded is outside of the issues made.—*Id.*
  3. **MISDESCRIPTION OF PROPERTY IN CLAIM.**—Where there is no description in the notice of lien sufficient to identify the mining claim upon which the work was actually done with reasonable certainty, to the exclusion of other premises, the notice of lien is insufficient.—*Fernandes v. Burleson*, 164.
  4. **NOTICE OF LIEN NOT AMENDABLE—PARTICULAR DESCRIPTION CONTROLLING.**—The notice of lien is not an instrument susceptible of reformation, and the monuments and lines by which the property is said in the notice to be particularly described cannot be expunged from the notice, but must be read as part of it, and are of the essence of the description, and must control it.—*Id.*
  5. **LABORER'S LIEN—CONSTRUCTION OF STATUTE—PLEADING—TERMS OF STATUTE.**—The act of March 31, 1891, giving a lien to mechanics and laborers employed by a corporation for wages earned by and due them weekly or monthly, applies only to corporations doing business in the state who employ laborers or mechanics by the week or month, and whose wages under the terms of their employment are payable weekly or monthly; and a plaintiff seeking to enforce the lien given by that statute must bring himself within the terms stated, and aver that the wages due him were earned weekly or monthly.—*Keener v. Eagle Lake L. & I. Co.*, 627.
  6. **FILING NOTICE OF LIEN.**—A laborer does not acquire any right to enforce a lien under the act of 1891 by reason of filing a notice of mechanic's lien.—*Id.*
  7. **ALLOWANCE OF COUNSEL FEES.**—Where there is no lien to be enforced there can be no allowance of counsel fees in the action.—*Id.*

**MINES AND MINING.** See EASEMENT, 3-5; MECHANICS' LIENS, 3.

**MINORS.** See GUARDIAN AND WARD; STATUTE OF LIMITATIONS, 9.

**MISTAKE.** See VENDOR AND VENDEE.

**MORTGAGE.**

1. **MORTGAGE FOR DEBT OF ANOTHER—SURETYSHIP—DISCHARGE OF LIEN—CHANGE OF PRINCIPAL CONTRACT.**—When property of any kind is mortgaged or pledged by the owner to answer for the default or miscarriage of another person, such property occupies the position of a surety or guarantor, and anything which will dis-

## MORTGAGE (Continued).

charge an individual surety or guarantor who is personally liable will, under similar circumstances, discharge such property; and the mortgaged property is exonerated from all liability as surety if, after the execution of the mortgage, the principal contract between the debtor and creditor is altered in any material particular without the consent of the mortgagor.—*Parke & Lacy Co. v. White River Lumber Co.*, 658.

2. **RECITALS IN MORTGAGE—ESTOPPEL—REFERENCE TO LEASE—CONDITIONAL SALE—ALTERATION OF TERMS.**—A recital in a mortgage executed by a third person to secure payments under a lease which operates in law as a conditional sale, that the principal debtor is justly indebted to the creditor for the full sum agreed to be paid as rent for certain machinery in accordance with the terms of the lease, does not estop the mortgagor from showing that the terms of the lease were afterward altered by the parties, and that no indebtedness ever accrued in accordance with its original terms.—*Id.*
3. **NOTE SECURED BY MORTGAGE—FORECLOSURE.**—Where the mortgage, in addition to being given as security for the lease, is also given to secure the payment of a promissory note which is distinct from the lease or conditional sale, and which has not been altered in any respect, the mortgage should be foreclosed therefor, though discharged as to the lease by the change of its terms.—*Id.*
4. **FORECLOSURE OF MORTGAGE—PLEADING—AVERMENT OF NONPAYMENT ESSENTIAL—APPEAL FROM DEFAULT JUDGMENT.**—In an action to foreclose a mortgage securing a note, the breach of the contract to pay the note is of the essence of the cause of action, and must be alleged; and a failure to aver nonpayment of the note is fatal to the complaint upon appeal, although no demurrer was interposed, and the judgment went by default.—*Ryan v. Holliday*, 335.
5. **AVERMENT OF AMOUNT DUE—CONCLUSION OF LAW.**—An averment that “there is now due and owing to the plaintiff” a specified sum is but the averment of a conclusion of law, and not of a fact, and is not the equivalent of an averment of nonpayment.—*Id.*
6. **ESTATES OF DECEASED PERSONS—PURCHASE OF MORTGAGED LAND BY DECEDENT—PLEADING—PRESENTATION OF CLAIM—WAIVER.**—A complaint in an action to foreclose a mortgage which was not executed by the deceased person, in which the administrator of the deceased person is made a party defendant solely by reason of the fact that subsequently to the making of the mortgage the mortgaged land was purchased by the decedent in his lifetime, and the title thereto vested in his estate at his death, subject to the mortgage lien, need not aver either a presentation of a claim against the estate of the decedent, or an express waiver of any recourse against his general estate.—*Id.*
7. **CLAIMS AGAINST ESTATE—CONSTRUCTION OF CODE.**—Section 1500 of the Code of Civil Procedure only applies to cases where the note and mortgage constitute a claim against the estate of a deceased person, and has no application to a case where he purchased the land subject to a mortgage, in which case there is no claim to be presented against his estate.—*Id.*



## MORTGAGE (Continued).

8. **FORECLOSURE OF MORTGAGE—PLEDGE—COLLATERAL SECURITY—TRUST EVIDENCE—HARMLESS RULING.**—In an action to foreclose a mortgage and a pledge of water stock, in which the complaint alleges the execution of a promissory note by the defendant to the plaintiff, payable on demand, with provision for a reasonable attorney's fee in case of suit, and an assignment of shares of water stock as security therefor, and that as further security the defendant afterward executed and delivered to a third party a note and mortgage for a larger sum, which was assigned to the plaintiff, and it was sought to foreclose the mortgage so assigned, and the pledge of the water stock, for the amount only of the original note, and for a reasonable attorney's fee, and the answer of the defendant denied that the mortgage was executed to secure the payment of the original note held by plaintiff, but alleged that it was executed in trust to the payee thereof to take up and deliver three notes of the defendant, aggregating the principal sum named in the mortgage, one of which was the note in suit, and that the trust was violated by the mortgagee, and the mortgage transferred to the plaintiff without the knowledge and consent of the defendant, in violation of said trust, the collateral note and mortgage are admissible in evidence under the issues tendered; and where the court found in favor of the plaintiff upon all of the issues, and foreclosed the mortgage for the amount of the original note and interest, the mortgagor could not be prejudiced by rulings upon the admission of evidence respecting the mortgage, and as to whether the mortgagee had failed to take up the notes as alleged by the defendant.—*First National Bank of Fresno v. Dwyer*, 69.
9. **MISTAKE IN FINDINGS AND JUDGMENT—FAILURE TO FORECLOSE PLEDGE—AMENDMENT—JURISDICTION.**—In an action to foreclose a mortgage and a pledge of water stock, where neither the conclusions of law, nor the order for judgment, nor the judgment as entered make any disposition of the stock which was pledged as security for the debt, the trial court has no jurisdiction, after the entry of judgment foreclosing the mortgage, to amend the findings and judgment so as to provide further for a foreclosure of the pledge.—*Id.*
10. **DECISION AGAINST LAW—NEW TRIAL—APPEAL.**—The failure of the court to order and adjudge the foreclosure of the pledge of water stock is an error of law which may be assigned by the defendant as a decision against law in his motion for a new trial, and such erroneous decision could only be corrected in the court below by granting the motion for a new trial; but where the fact that the pledge of the water stock was made, and that it preceded the mortgage security foreclosed, is admitted by the answer, the appellate court may, upon appeal, order a modification of the judgment so as to include an order of sale of the water stock, and to order it to be first sold, unless the defendant should otherwise direct.—*Id.*
11. **FORECLOSURE OF MORTGAGE—CROSS-COMPLAINT—SERVICE UPON DEFAULTING DEFENDANTS.**—In an action to foreclose a mortgage, where the mortgagor and his wife, who is alleged to have or claim some interest in the mortgaged property, made default, cross-complaints by subsequent lienholders must be served upon the defaulting defendants, and, without such service, the court has no power

## MORTGAGE (Continued).

- or authority to grant to the cross-complainants any affirmative relief.—*Hibernia S. & L. Soc. v. Clarke*, 27.
12. OBLIGATIONS OF HUSBAND—ERRONEOUS JUDGMENT AGAINST WIFE.—Where the note and mortgage which were the basis of the action were executed only by a husband, and a judgment lien pleaded by a cross-complainant was against the husband only, it is error for the court to adjudge that the plaintiff and the cross-complainant respectively recover from both husband and wife the amount of their respective claims.—*Id.*
13. FORECLOSURE OF MORTGAGE—OPTION TO RENEW NOTE—PRESUMPTION—BURDEN OF PROOF.—In an action to foreclose a mortgage given to secure the payment of a note, where it appears that the original period for the maturity of the note was past at the time of the commencement of the action, the fact that the note provides that, if it is not paid at maturity, it is renewed from year to year, at the option of the holder, until paid, and that, during such year, the maker shall not have the right to pay the same, does not create a presumption that the note was renewed, in the exercise of the option, in the absence of evidence tending to prove it; and the burden is upon the maker to show affirmatively that the holder, in the exercise of the option given him, renewed the note, and thereby extended the time of payment to a day later than that on which the action was commenced.—*California State Bank v. Webber*, 538.
14. RENEWAL OF NOTE—EXTENSION OF TIME—PLEADING—AFFIRMATIVE DEFENSE.—If there had been a renewal of the note, in the exercise of the option, whereby the time of payment was extended to a later day than that on which the action was commenced, such renewal would have been matter of affirmative defense, which must have been pleaded and proved by the defendant.—*Id.*
15. CONSTITUTIONAL LAW—AGREEMENT AS TO PAYMENT OF TAXES—OPTION OF MORTGAGEE—CREDIT UPON INTEREST.—Where a conventional rate of interest is agreed upon, a verbal agreement that if the mortgagor should pay the taxes and assessments on the mortgage a reduction should be allowed upon the agreed interest, is not in violation of the constitution of the state, and does not release defendant from his contract to pay the conventional interest specified in the note.—*Id.*
16. VERBAL AGREEMENT AS TO TAXES—DEFENSE AS TO INTEREST.—A verbal agreement that the mortgagor shall pay the taxes upon the mortgage is no defense to the demand for interest.—*Id.*

See EASEMENT, 4, 5; INTEREST, 1; STATUTE OF LIMITATIONS, 2-4; STREET ASSESSMENT, 15.

MUNICIPAL CORPORATIONS. See TAXATION.

MURDER AND MANSLAUGHTER. See CRIMINAL LAW, 14, 16.

MUTUAL BENEFIT SOCIETY.

1. ACTION UPON CERTIFICATE—COMPLIANCE OF MEMBER WITH RULES—GOOD STANDING—EVIDENCE—PRESUMPTION—BURDEN OF PROOF. In an action by the widow of a deceased member of a mutual benefit society, brought upon a certificate issued to such member, entitling him to participate in a specified sum in the beneficiary fund of the order, to be paid at his death to his wife, on condition that he shall, while a member of the order, comply with its rules

## MUTUAL BENEFIT SOCIETY (Continued).

and requirements, where issue is joined as to such compliance, the burden upon the plaintiff of proving that the deceased was a member of the order in good standing at the time of his death is sufficiently sustained by introducing the certificate of membership, which is evidence of his good standing when issued, and such good standing will be presumed to continue in the absence of proof to the contrary; and the burden devolves upon the society to rebut such presumption by showing the loss of such good standing, by failure to comply with the rules, or to pay required assessments.—*Kumle v. Grand Lodge Ancient Order of United Workmen of California*, 204.

2. **SUBMISSION OF CONTROVERSY—ARBITRATION—APPEAL TO SUPREME GRAND LODGE—REFUSAL TO PAY—JURISDICTION OF COURT.**—Where there is nothing in the certificate, or in the laws or regulations of the order, requiring a controversy between the widow of a deceased member, to whom the certificate is payable, to be submitted to the order for adjustment, or making its action thereon final, the fact that the widow presented the certificate and proofs of death to another member of the subordinate lodge, and that such member, upon refusal by the subordinate lodge to acknowledge the claim, requested the grand lodge to approve the claim, which it also refused to do, does not show a submission of the controversy in the sense of an arbitration; nor does the right given to a member to appeal to the supreme grand lodge affect the rights or obligations of the widow, who is not a member of the order; nor does the refusal of the order to pay the claim constitute a final adjudication thereof, or affect the jurisdiction of the superior court to enforce the claim.—*Id.*
3. **ODD FELLOWS—EXPULSION OF MEMBER FOR CONTEMPT—RESTORATION—MANDAMUS.**—Where a member, who signed the written constitution and by-laws of an Odd Fellows' lodge, has been expelled, in accordance with the provisions of the by-laws, for a violation thereof on his part, and for contempt in refusing to appear before a committee appointed to try charges against him, in pursuance of the constitution and by-laws of the lodge, *mandamus* will not lie to restore him to membership.—*Levy v. Magnolia Lodge, No. 29, I. O. O. F.*, 297.
4. **RIGHT TO SICK BENEFITS—REMEDY IN LODGE—JURISDICTION OF COURTS—DEFENSE.**—Although the courts have jurisdiction to hear and dispose of a complaint against a lodge for refusal to allow sick benefits, yet, where the laws of the lodge provide a remedy for the grievance complained of, that remedy must first be pursued and exhausted; and the failure to pursue that remedy is a perfect defense to an action in any state court.—*Id.*
5. **SPECIFICATION OF CHARGES AGAINST MEMBER.**—The charges against a member of a lodge for a breach of its laws are sufficiently specific when they apprise the member of the nature of the charges, and enable him to prepare for his defense.—*Id.*
6. **CONTRACT OF MEMBER—WAIVER OF RIGHT TO OBJECT TO REPORT OF COMMITTEE—DEFAULT—CONCLUSIVENESS OF REPORT.**—A member who has signed the by-laws of a lodge, which provide that a member may be expelled for contempt in failing to appear before a committee to stand trial upon charges, and that in such case the report of the committee shall be conclusive, waives any right of

## MUTUAL BENEFIT SOCIETY (Continued).

objection to the report of the committee, by intentional default in refusing to appear before it to answer to the charges made against him.—*Id.*

7. UNREASONABLE BY-LAW—WAIVER OF OBJECTION BY CONTRACT.—What might be bad or unreasonable as a by-law, as being against common right, may be good as a contract; and a man may part with or waive a common right voluntarily, of which it would be impolitic and unjust to deprive him by a by-law passed without his assent.—*Id.*

## NEGLIGENCE.

1. RIGHTS OF MINOR PLAINTIFFS—"HEIRS" OF WIFE AND MOTHER—CONSTRUCTION OF CODE—COMMUNITY PROPERTY—COMMON LAW.—Section 337 of the Code of Civil Procedure, giving a right of action for a death caused by negligence to the "heirs or personal representatives" of the deceased, is not intended to limit the damages recoverable to the community relation in which the husband is the only heir of the wife; but the word "heirs" is used in its common-law sense, and denotes those who are capable of inheriting from the deceased person generally, without reference to the distribution of community property.—*Redfield v. Oakland Cons. St. Ry. Co.*, 277.
2. DAMAGES TO HEIRS OF WIFE NOT COMMUNITY PROPERTY—SUCCESSION—RIGHTS OF HUSBAND.—The damages allowed to heirs for the death of a wife and mother have no existence prior to her death, and are not community property; and the husband's right to recover them is not based upon the supposition that they are a part of her estate, or passed to him under the statute relating to the succession or inheritance of property.—*Id.*
3. RECOVERY LIMITED TO INJURIES TO PLAINTIFFS.—The recovery in an action for death is for the injuries inflicted upon the plaintiffs, and not for the injuries inflicted upon the deceased.—*Id.*
4. JOINDER OF PARTIES—APPEARANCE BY HUSBAND AS GUARDIAN AD LITEM OF MINORS—INTEREST IN JUDGMENT.—All of the heirs may be joined as parties in an action for the death of a wife and mother, and the fact that the husband is a party individually, and that the minors also appeared by him as their guardian *ad litem*, does not affect their interest in the judgment, nor vest any part thereof, or any interest therein, in the guardian *ad litem*; and it is no ground of objection to the verdict and judgment that it runs in favor of the husband as an individual and also as guardian *ad litem* of the minors.—*Id.*
5. NEGLIGENCE OF ELECTRIC RAILROAD COMPANY—RUNAWAY OF CAR—INSUFFICIENT CARE AT SWITCH—ACCIDENTAL FALL OF MOTORMAN.—It is conclusive evidence of negligence for an electric railroad company to put but one man in charge of a car in passing a switch at a place where one man is required at each end of the car; and it is also negligence for the one man put in charge of the car not to stop the car to adjust the trolley in going around a curve over a switch upon a hill, where it appears that the accident occurred through the running away of the car, and its leaving the track in going down the hill with no one in charge, by reason of his having fallen to the ground in attempting to return to his position on the front platform, after having left it to adjust the trolley,

## NEGLIGENCE (Continued).

- and being rendered thereby unable to catch the car; and his accidental fall to the ground, under such circumstances, cannot render the injuries to the passengers the result of an unavoidable accident or inevitable casualty.—*Id.*
6. **FALL OF DERRICK MAST—INTERFERENCE WITH GUY ROPES—CONFLICTING EVIDENCE.**—Where the plaintiff was injured by the fall of a derrick mast upon which he had climbed for the purpose of adjusting a block and tackle, and there is evidence tending to show that the defendant was negligent in attempting to change one of the two guy ropes by which the mast was sustained, the decision in favor of the plaintiff cannot be disturbed by reason of conflicting evidence to the contrary.—*Anderson v. Hinshaw*, 682.
7. **MASTER AND SERVANT—TELEPHONE LINEMAN.**—A lineman of a telephone company, who, while engaged in stringing a line of wire upon certain telephone poles, voluntarily climbs a tree to arrange the wire, and while so employed is injured by the breaking of the limb upon which he was standing, cannot recover for the injury from the company.—*Yearsley v. Sunset Telephone and Telegraph Co.*, 236.
8. **ATTORNEY AND CLIENT—DRAWING OF WILL—IMPROPER ACTION BY LEGATEE.**—A legatee named in a will cannot maintain an action to recover for alleged negligence of an attorney employed by the testator to draw the will, in so drawing it as not to express legally the desires or direction of the testator as to the exclusion of grandchildren, by which exclusion the legatee would have been benefited, and in further causing the legatee to become one of the subscribing witnesses, thus rendering the will void as to him; and a complaint of such legatee seeking to recover damages from the attorney for such alleged negligence does not state a cause of action.—*Buckley v. Gray*, 339.
9. **LIABILITY OF ATTORNEY FOR NEGLIGENCE LIMITED TO CLIENT—PRIORITY OF CONTRACT.**—Where an attorney has been guilty of no fraud or collusion, nor of any malicious or tortious act, he is liable only to the client employing him for any injury arising from mere negligence, however gross, and cannot be held liable to a third party with whom he had no privity of contract.—*Id.*
10. **BREACH OF CONTRACT—RIGHT OF THIRD PARTY.**—A third party has no right to maintain an action for injuries resulting from a breach of contract between two contracting parties.—*Id.*
11. **LIMIT OF ACTIONABLE NEGLIGENCE—DUTY.**—The limit of the doctrine relating to actionable negligence, in the absence of fraud and collusion, is that the person causing the loss must owe a duty, arising from contract or otherwise, to the person sustaining such loss; and if there is no such duty no action can be maintained, no matter how great the loss of the plaintiff may be.—*Id.*
12. **CONTRACT FOR BENEFIT OF THIRD PERSON—CONSTRUCTION OF CODE.** Section 1559 of the Civil Code, which authorizes a third person to enforce a contract made by one person with another for his benefit, applies only to cases where the contract is made expressly for the benefit of the third person, and not where the third person is or may be incidentally or remotely benefited as a result of the contract.—*Id.*

## NEGLIGENCE (Continued).

13. **DISTINCTION BETWEEN WILL AND CONTRACT.**—The terms of the contract of employment of an attorney to draft a will are distinct from the terms of the will; and the fact that the will may be intended for the benefit of a third person does not make the contract of employment of the attorney a contract made expressly for his benefit.—*Id.*
14. **INTENTION OF TESTATOR—EFFECT OF WILL—RIGHT OF LEGATEE NOT VESTED—ULTIMATE INJURY—DAMNUM ABSQUE INJURIA.**—The intention of a testator that the legatee should be benefited by being provided for in his will in a particular way, if carried out, could not create a vested right until the death of the testator, and until that event the will would remain ambulatory, and the provision for the legatee could be at any time changed or withdrawn; and any ultimate consequential injury to the legatee by the negligence of the attorney in not drafting the will according to the testator's intention, however great it may be, is *damnum absque injuria*, against which the courts cannot relieve.—*Id.*
15. **STREET RAILWAY—COLLISION—RIGHTS OF TRAVELERS IN ADVANCE OF CAR—PRESUMPTION.**—A street railway company has no exclusive use of any portion of the highway, its right being to a use in common with the public, and peculiar only so far as its inability to move from its track makes it so; and travelers upon the highway going in the same direction in advance of a street-car have a right to presume that the street railway company will use its franchise in view of the rights of others to avoid a collision.—*Mahoney v. San Francisco and San Mateo Ry. Co.*, 471.
16. **CONTRIBUTORY NEGLIGENCE—DRIVING NEAR TRACK AT NIGHT—DUTY OF ELECTRIC RAILWAY.**—It is not negligence *per se* to travel along or near to the track in the same direction in which an electric car is going; but it is the duty of the electric railway to maintain a sufficient light at night upon the car to see an obstruction in time to stop the car, or to move with less velocity, so as to avoid a collision with a traveler driving upon or near the track in advance of the car.—*Id.*
17. **ACTION FOR DEATH—EVIDENCE—MEANS OF CHILDREN.**—In an action for death, brought by the wife and minor children of the deceased, it is erroneous to allow the plaintiffs to prove that the children have no means of their own.—*Id.*
18. **CONTRIBUTORY NEGLIGENCE—QUESTION OF FACT.**—If the court is not satisfied that the evidence, as matter of law, establishes the contributory negligence of the plaintiff, or if it believes that under the evidence touching the conduct of the plaintiff, reasonable minds might differ upon the question whether or not he was negligent, that question is one of fact which it is the duty of the court to allow the jury to determine.—*McKune v. Santa Clara Valley Mill and Lumber Co.*, 480.
19. **FRIGHTENING OF HORSE—NEGLIGENCE OF MILL AND LUMBER COMPANY.**—Where a mill and lumber company has negligently piled and maintained lumber upon a public street, in violation of an ordinance, and the occupants of a buggy, driving upon the proper side of the roadway, were compelled to turn around a pile of lumber on the street, and were thus brought close to a railroad track, and then for the first time discovered that there were

## NEGLIGENCE (Continued).

- other piles of lumber that had to be passed, when for the first time they noticed an approaching train, and were caught in a position where they could neither advance nor retreat, nor cross the track with safety, and where they could not move to the roadside away from the approaching train because of the obstructing lumber, whereupon the horse became frightened by the approaching train, and backed upon the track to the injury of the plaintiff, the question of contributory negligence of the plaintiff is properly left to the jury.—*Id.*
20. **UNAUTHORIZED OBSTRUCTION OF HIGHWAY—OWNERSHIP OF LUMBER—PRESUMPTION OF RESPONSIBILITY.**—Where lumber piled in front of a planing mill along the outside of a sidewalk was owned by a mill and lumber company, which operated the planing mill, it will be presumed, in the absence of any counter-showing, that it was piled there with the knowledge and consent of the owner, and the unauthorized obstruction of a highway to the injury of another is an act of negligence for which the mill and lumber company is responsible.—*Id.*
21. **FAILURE TO COMPLY WITH MUNICIPAL ORDINANCE.**—The failure to comply with a municipal ordinance, or to perform a duty imposed by a municipal ordinance prohibiting the obstruction of a street, whereby the plaintiff was injured, is negligence *per se*.—*Id.*
22. **INSTRUCTIONS—LIMITATIONS.**—An instruction in regard to the violation of an ordinance is not erroneous by reason of omitting a limitation which is not applicable to the case, or for not directly including the question of contributory negligence, when the instructions as a whole show that the jury was fully instructed upon the doctrine of contributory negligence.—*Id.*
23. **PRIVATE RAILROAD—NEGLIGENCE—DUTY OF EMPLOYER TO EMPLOYEES—DEFECTIVE ROADBED.**—The owner of a private railroad, used in connection with lumber business, owes to his employees the duty of keeping the road in good repair after construction; and, if an injury to an employee riding upon the train is proximately caused by reason of a defective roadbed, the employee is entitled to recover for the injury.—*Bowman v. White*, 23.
24. **WASHOUT IN ROAD—OBJECT OF TRAIN—CONFLICTING EVIDENCE—NONSUIT—QUESTION FOR JURY.**—Where an employee upon a construction train is killed by reason of the train running into a washout, and there is conflicting evidence as to whether the construction train, at the time of the accident, was upon the track for the purpose of repairing defects in the road, wherever found, as it passed upon its way, or whether it was bound for a more distant point upon the road, no question of law is raised upon a motion for nonsuit, but rather a pure question of fact, which should be solved by the jury alone, and it is error to grant a nonsuit.—*Id.*
25. **OBJECT OF TRAIN, WHEN IMMATERIAL—DUTY OF OWNER OF TRACK.** If the train was bound to an ulterior destination beyond the place where the accident occurred, it is immaterial what its object was in going there, whether for wood or for the purpose of repairing the track, or for some other purpose; for, if it started to such point in the line of its duty, the owner of the road was bound to furnish a safe roadbed and track upon which to travel.—*Id.*
26. **INJURY FROM STREET-CAR—CONTRIBUTORY NEGLIGENCE—CARELESS STEPPING UPON TRACK—NONSUIT.**—In an action to recover

## NEGLIGENCE (Continued).

damages for personal injuries received by plaintiff from collision with a moving cable-car, the act of the plaintiff in stepping backward upon the track in front of the moving car, without noticing an approaching car upon the track some ten feet distant, and in plain view, is contributory negligence, as matter of law, proximately contributing to the injury; and a nonsuit is properly granted upon that ground.—*Bailey v. Market Street Cable Railway Company*, 320.

27. DUTY OF ONE WHO CROSSES RAILROAD TRACK—STANDARD OF NEGLIGENCE.—One who crosses a railroad track is required to be on his guard, and, as the law now stands, the standard is fixed that one must look up and down the track, and anything short of that is negligence.—*Id.*
28. RIGHT OF WAY OF STREET-CAR.—A street-car has, from necessity, a right of way over that portion of the street upon which alone it can travel, paramount to that of persons and ordinary vehicles, though this superior right is not exclusive, and does not prevent others from driving or passing across or along its tracks at any place or time, when by so doing it will not materially interfere with the progress of the cars.—*Id.*
29. PASSAGE OF CARS—DUTY OF CITIZEN.—It is the duty of the citizen, whether on foot or in vehicles, to give unobstructed passage to the cars, which cannot turn out or leave the track, and which are operated by companies chartered, presumably, for the convenience of the public.—*Id.*

See CONTRACT, 1; DAMAGES, 1-5; NEW TRIAL, 1.

## NEW CITY HALL.

NEW CITY HALL COMMISSIONERS—MODIFICATION OF PLANS.—Under the act of March 24, 1876, the present board of new city hall commissioners has the same discretionary powers to modify the plans of the new city hall as that enjoyed by their predecessors under the act of 1870, page 738, and consequently may make deviations from the plans adopted by the commissioners in 1871, under the provisions of the act of 1870; and their action in providing for the construction of a dome, in place of a square clock tower contemplated by the original plans, is not an abuse or in excess of a reasonable exercise of their powers.—*Laver v. Ellert*, 221.

## NEW TRIAL.

- I. NEGLIGENCE—COLLISION OF STREET RAILWAYS—NEWLY DISCOVERED EVIDENCE.—In an action to recover damages from a collision of the cars of two street railways, where a verdict and judgment was passed in favor of the plaintiff against one of the street railway companies alone, a motion for a new trial of such street railway company upon the ground of newly discovered evidence, is properly denied, where the newly discovered evidence bears only upon the question of the relative degree of negligence of the two street railway companies, and does not tend to rebut or defeat plaintiff's right to recover from both of them, and presents evidence of the same general character, and to the same point, as much of the evidence adduced at the trial, and is not such as would render a different result upon a new trial reason-



## NEW TRIAL (Continued).

ably probable.—*Howland v. Oakland Consolidated Street Railway Company*, 513.

2. **IRREGULARITY—ALLUSION OF JUDGE TO POVERTY OF PLAINTIFFS—IMPROPER STATEMENTS TO JURY.**—Where it appears that after the jury had been out for several hours without agreement, they were brought into court with a statement of failure to agree, and that the judge, after finding out that the jury stood eight to three, called attention to the fact that, if the jury could not agree, all the expenses would fall upon the plaintiff, who was not well off, and informed them that the plaintiff required nine men, and that if it was possible for one of the three to arrive at a conclusion, anything the judge could do he would cheerfully do, and stated that he would send them out once more, and give them a chance to try to agree, expressing the opinion that, when the jury appreciated the circumstances and situation of the parties, they would make one more effort to do it, after which the jury returned a heavy verdict for the plaintiff in a few minutes, a new trial should be granted for irregularity on the part of the court.—*Mahoney v. S. F. & S. M. Ry. Co.*, 471.
3. **CONDITIONAL ORDER GRANTING.**—An order granting a new trial on account of the insufficiency of the evidence to justify the verdict is within the discretion of the trial court, and that court may make its order conditional upon the payment to the opposite party of a sum of money for counsel fees and expenses. Such an order will not be disturbed on appeal unless it manifestly appears that there has been an abuse of discretion.—*Brooks v. S. F. & N. P. Ry. Co.*, 173.
4. **ORDER DENYING NEW TRIAL—DISCRETION.**—Where it does not appear that the court abused its discretion in denying the motion for a new trial, its order will not be interfered with upon appeal, although, if the motion had been granted, the appellate court could not have disapproved the order.—*Anderson v. Hinshaw*, 682.
5. **STATEMENT—VERDICT OF JURY—INSUFFICIENCY OF EVIDENCE—SPECIAL FINDINGS—IMPROPER SPECIFICATIONS.**—An allegation in a statement upon a motion for a new trial, under the head of "Insufficiency of the evidence to justify the verdict" as to what the evidence established, is insufficient as a specification of particulars, wherein the evidence is insufficient; nor can special findings of the jury be properly assailed by a general statement, under the head of "Errors of law occurring at the trial," that the verdict of the jury on each special issue "was error."—*Kunsle v. G. L. A. O. U. W.*, 204.

See **APPEAL**, 4, 5, 8, 10; **MORTGAGE**, 10; **STREET ASSESSMENT**, 9.

## NUISANCE.

1. **OBSTRUCTION OF WATERCOURSE—INJUNCTION—FORMER ADJUDICATION—RECOVERY OF DAMAGES—INJURIES NOT ADJUDICATED.**—In an action to enjoin the continuance of a nuisance caused by the obstruction of a watercourse in which the complaint alleges injury to the plaintiff's land and buildings, a former judgment for the recovery of damages caused by the obstruction of the same watercourse, the record of which does not disclose that injury was caused to the plaintiff's buildings, or to the rental value of his premises, is not conclusive as to such injury; and

## NUISANCE (Continued).

it is open for the defendant to show that the injuries to the building complained of were the result of defects in its construction, or of its situation, uninfluenced by the nuisance created by the defendant; and a decision founded on evidence tending to prove those facts cannot be disturbed as being in conflict with the prior adjudication.—*Richardson v. City of Eureka*, 441.

2. RES ADJUDICATA—INFERENCE.—The application of the doctrine of *res adjudicata* cannot be made by inference or surmise upon the effect of the judgment.—*Id.*
3. STREET CULVERT—CONTINUANCE OF OBSTRUCTION—OFFER TO REDRESS INJURY—REFUSAL OF INJUNCTION.—Where a city had obstructed a watercourse, by the erection of a culvert across a street, to the injury of the plaintiff, and had endeavored to redress the injury in a proper manner, but its efforts were thwarted by the conduct of the plaintiff in refusing to accept the offered remedy, an injunction was rightfully refused to prevent the wrong which was otherwise irremediable.—*Id.*

See FINDINGS, 3.

OFFICE AND OFFICERS. See PUBLIC OFFICERS.

ORDINANCE. See NEGLIGENCE, 21, 22.

PARTIES. See HUSBAND AND WIFE, 3; NEGLIGENCE, 4; PARTNERSHIP, 1, 6.

PARTITION. See BOUNDARIES, 1, 3, 4; INSOLVENCY, 5-7.

## PARTNERSHIP.

1. ACTION UPON NOTE—JUDGMENT BY DEFAULT AGAINST PART OF DEFENDANTS.—In an action upon a partnership note against three persons charged to have constituted the partnership, whose name is signed to the note, judgment may be entered by default against two of the defendants, although the action does not prevail as to the third defendant.—*Bailey Loan Co. v. Hall*, 490.
2. SEVERAL JUDGMENT—JOINT CONTRACT—CHANGE OF COMMON LAW—CONSTRUCTION OF CODE.—Section 578 of the Code of Civil Procedure, which authorizes a judgment to be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, abrogates the rule at common law that, in an action upon a joint contract, the plaintiff must recover against all or none; and the rule established by that section includes as well cases in which some of the defendants have made default, as cases in which all of the defendants have appeared and answered, the only limitation being that in case of default the relief shall not exceed that which the plaintiff shall have demanded in his complaint.—*Id.*
3. SEVERAL LIABILITY OF PARTNERS.—The liability of partners upon a partnership note is several, as well as joint, and in a prayer for judgment upon such note against the defendants, the court is authorized to enter a several judgment against any of them.—*Id.*
4. ACTION FOR DISSOLUTION—SALE OF ASSETS BY RECEIVER BEFORE DECREE—JURISDICTION.—In an action for an accounting and

## PARTNERSHIP (Continued).

dissolution of a partnership, where the assets of the business have been placed in the hands of a receiver, and it appears to the court that they are not equal to the liabilities of the firm, and that the business has been carried on by the receiver at a loss, and that the loss will be further increased if the business is continued, and that it is for the best interest of the partnership that the business be sold as a whole, the court has jurisdiction to order a sale of the business, as being in its nature perishable property, prior to a decree of dissolution of the partnership.—*Wulff v. Superior Court*, 215.

5. **NECESSITY OF SALE—PRESERVATION OF ASSETS—POWER OF COURT.**—The court has the power to sell partnership assets by reason of an actual present necessity of sale, in order that the assets may be preserved to the final interest of the parties interested therein.—*Id.*
6. **ACTION BY ONE PARTNER—NONJOINER OF COPARTNERS—PLEADING—ANSWER—EVIDENCE—NONSUIT.**—One member of a partnership may recover the whole amount due his firm, unless the defendant plead the nonjoinder of the other members of the firm as parties to the action; and, where there is no such plea in the answer, the plaintiff cannot be nonsuited merely because a partnership demand is proven, instead of a separate demand due to the plaintiff.—*Williams v. Southern Pacific Railroad Company*, 457.

See ACCOUNTING; RECEIVER, 6; SALE, 4.

PATENT. See TOWNSITE.

PHYSICIAN. See WILLS, 9, 10.

## PLEADING.

1. **WAIVER OF GROUNDS OF SPECIAL DEMURRER.**—Objections to a complaint which are grounds of special demurrer are waived where the demurrer is general and no special grounds are specified therein.—*Daggett v. Gray*, 169.
2. **AID OF COMPLAINT BY ANSWER.**—An omitted allegation in the complaint may be aided by an averment of that fact in the answer, so as to uphold a judgment thereon, even though a demurrer to the complaint for the want of the fact had been erroneously overruled.—*Id.*
3. **ALLEGATION OF DEMAND—WAIVER OF OMISSION.**—A claim by a bailee in his answer of the ownership of goods intrusted to his keeping, and a denial of any title in his bailor, obviates the necessity of proving a demand for the goods before bringing suit, and waives the omission of an allegation of such demand.—*Id.*
4. **PROOF OF DEED—COPY ANNEXED TO ANSWER—FAILURE TO FILE AFFIDAVIT—ADMISSION OF EXECUTION AND GENUINENESS.**—Where a copy of a deed from the plaintiff to the defendants is annexed to the answer of the defendant in an action to quiet title, if no affidavit denying its genuineness and due execution is filed, the same are deemed admitted, and it is not necessary for the defendant to offer the deed in evidence.—*Rosenthal v. Merced Bank*, 198.
5. **VARIANCE—ABATEMENT—LIMITATIONS.**—In an action upon a claim presented against the estate of a deceased person the complaint

## PLEADING (Continued).

should conform to the statement of the claim as presented, and where the claim presented is a mere money demand which is upon its face barred by the statute of limitations, by reason of there being no hint of a trust therein, and the complaint contains for the first time an allegation of a trust not included in the claim, the defendant may plead the statute of limitations against the rejected claim, and may also plead the variance, and the nonpresentation of the trust claim in abatement of the action.—*McGrath v. Carroll*, 79.

6. **CONJUNCTIVE DENIAL.**—A conjunctive denial of several distinct allegations of the complaint, connected by the conjunction "and," is not a denial of any one of them.—*Wise v. Rose*, 159.

See ACCOUNTING, 1-3, 5; COMMON CARRIER, 13; CONTRACT, 1, 2; CONVERSION; INSOLVENCY, 1, 5-7; JUDGMENT, 5-7; JUSTICE'S COURT, 1, 4; MARRIED WOMEN; MECHANICS' LIENS, 1, 2, 5; MORTGAGE, 4-6, 8, 11, 14; PARTNERSHIP, 6; PRACTICE, 2, 3; ROADS AND HIGHWAYS, 1; SALE, 9; STATUTE OF LIMITATIONS, 5-7; SUMMONS, 6; WAGER.

## PLEDGE.

1. **CORPORATIONS—PLEDGE OF STOCK—SPECIFIC PERFORMANCE.**—The pledgor of shares of stock in a corporation is entitled to a specific performance of the contract for return of the stock, upon payment or tender of the amount of the indebtedness to secure which it was pledged, if it appears that the stock has no market or ascertainable value, and that the pledgor purchased it for investment with a view to anticipated increase in value, and that he cannot purchase other shares in the corporation for the reason that no holder will sell them.—*Krouse v. Woodward*, 638.
2. **TRANSFER OF CERTIFICATE BY PLEDGEE—BONA FIDE PURCHASER—LIABILITY OF PLEDGEE.**—Where there is no difference in the value of the shares, and the certificate of stock pledged has been conveyed by the pledgee to a *bona fide* purchaser for value, the court may compel the pledgee to convey stock owned by him in lieu of the certificate received from the pledgor.—*Id.*
3. **PLEDGE FOR PURCHASE MONEY BORROWED.**—The right of the pledgor to redeem the pledge, and insist upon the return of the shares of stock pledged, is not affected by the fact that he borrowed from the pledgee the money with which he purchased the stock.—*Id.*

See MORTGAGE, 8-10.

**POLICE COMMISSIONERS.** See PUBLIC OFFICERS, 4, 5.

**POLICE COURT.** See JURY AND JURORS, 1-3.

## PRACTICE.

7. **OVERRULING MOTION FOR NONSUIT.**—Where there is sufficient testimony to justify the court in submitting the facts to a jury, it is proper to overrule a motion for a nonsuit.—*Anderson v. Hinshaw*, 682.
8. **AMENDMENT OF ANSWER—DISCRETION OF COURT.**—An application for leave to amend an answer by adding a denial thereto is ad-

## PRACTICE (Continued).

dressed to the sound legal discretion of the trial court; and its action in refusing to allow the amendment will not be disturbed, unless it appears that it abused its discretion, and that the defendant was prejudiced thereby.—*County of Siskiyou v. Gamlich*, 94.

3. AMENDMENT OF PLEADING—DISCRETION—REQUEST—PRESUMPTION.—Leave to amend a defective complaint, while addressed to the discretion of the court, should be liberally granted to subserve the ends of justice; and, in any ordinary case of absence of averment, or of insufficient averment, it is an abuse of discretion to refuse leave to amend; but, where there is no right to maintain the bill, and no request is made for an amendment, error will not be presumed in not allowing it.—*Robertson v. Burrell*, 568.

See APPEAL; ATTORNEY AND CLIENT; CERTIORARI; CONTEMPT; COSTS; EVIDENCE; EXECUTION; FINDINGS; INSTRUCTIONS; JUDGMENT; NEW TRIAL; PLEADING; PROHIBITION; SUMMONS.

PRESTON SCHOOL OF INDUSTRY. See INDUSTRIAL SCHOOL.

PRINCIPAL AND AGENT. See AGENCY.

PROBATE LAW. See ESTATES OF DECEASED PERSONS.

## PROHIBITION.

1. APPEAL—STAY OF PROCEEDINGS.—The writ of prohibition lies only where there has been an excess of jurisdiction, and there is not a plain, speedy, and adequate remedy in the ordinary course of law; and where an appeal affords a complete and adequate remedy, and the same ends may be accomplished by it, and a stay of proceedings thereupon, as by writ of prohibition, although perhaps not in so expeditious a manner, the party is not entitled to the writ, but must resort to his remedy by appeal, although a question of jurisdiction may be involved.—*White v. Superior Court*, 54.
2. APPEAL FROM ORDER DIRECTING RECEIVER TO SELL—STAY OF PROCEEDINGS.—By an appeal from an order directing a receiver to sell the property of the husband to satisfy a decree for alimony, the hand of the superior court and that of its instrument, the receiver, may be effectually stayed, pending the determination of the appeal, by giving the proper bond, and there can be no necessity in such a case for prohibition.—*Id.*

See CONTEMPT, 5; RECEIVER, 1, 5, 7.

PROMISSORY NOTE. See SURETY.

## PUBLIC OFFICERS.

1. CRIMINAL LAW—MISDEMEANOR IN OFFICE—APPELLATE JURISDICTION—DISMISSAL.—A proceeding by accusation for alleged misdemeanors in office, under section 772 of the Penal Code, is a criminal proceeding not prosecuted by information or indictment, and is not within the appellate jurisdiction of the supreme court, and an appeal from the judgment rendered therein will be dismissed.—*Wheeler v. Donnell*, 655.

## PUBLIC OFFICERS (Continued).

2. **REMOVAL FROM OFFICE—FINE—JUDGMENT IN FAVOR OF INFORMER.** If the charges are substantiated, the fact that in such proceeding the court must enter a decree that the party accused be deprived of his office, and also enter a judgment in favor of the informer for the sum of five hundred dollars, does not make the demand a case at law for an amount greater than three hundred dollars within the appellate jurisdiction of the supreme court; but such judgment is for a fine, and the fact that it is payable to the informer, rather than into the county treasury, is wholly immaterial, and the provision therefor is purely incidental to the main purpose of the act, which is to secure the removal of the officer guilty of unlawful conduct.—*Id.*
3. **QUO WARRANTO—TITLE TO OFFICE.**—An accusation for misdemeanor in office is in no sense a proceeding in the nature of *quo warranto*, nor is the title of the office in issue therein.—*Id.*
4. **POLICE COMMISSIONERS OF SAN FRANCISCO—APPOINTMENT AND REMOVAL—POWER OF GOVERNOR.**—No term of office of police commissioner was fixed by the act of April 1, 1878, known as the McCoppin act, and no authority was given to the appointing power after making the appointments except to fill vacancies; and the governor cannot appoint a police commissioner in the absence of a vacancy, or create and fill a vacancy by removing an incumbent, and appointing one to succeed him.—*People ex rel. Mensies v. Gunst*, 447.
5. **CASE AFFIRMED.**—The case of *People ex rel. Hinton v. Hammond*, 66 Cal. 655, affirmed.—*Id.*

See COUNTY; EXECUTION; NEW CITY HALL; SURVEY.

**QUIETING TITLE.** See STATUTE OF LIMITATIONS, 3, 5; TOWNSITE.

**QUO WARRANTO.** See PUBLIC OFFICERS, 3.

**RAILROADS.** See COMMON CARRIERS; NEGLIGENCE, 5, 15, 16, 23-29; NEW TRIAL, 1.

**RECEIVER.**

1. **CORPORATIONS — NOTICE — BOND — JURISDICTION — CONTEMPT — PROHIBITION.**—An order appointing a receiver of the property of a corporation, made without any notice, and without any bond from the plaintiff on the appointment of the receiver, is without jurisdiction, and the enforcement of the order by proceedings for contempt, for refusing to deliver property to the receiver, will be prevented by writ of prohibition.—*Fischer v. Superior Court*, 129.
2. **NECESSITY OF NOTICE UPON APPOINTMENT OF RECEIVER.**—A receiver will not be appointed to take property out of the possession of a defendant without trial, without previous notice to the defendant, save in case of irreparable pending injury, and in no case where a temporary injunction would be sufficient.—*Id.*
3. **PROPERTY IN POSSESSION OF ANOTHER RECEIVER—JURISDICTION.**—A court has no power to appoint a receiver where a receiver has already been appointed by another court, with equal jurisdiction, and was in possession at the time of the appointment.—*Id.*

## RECEIVER (Continued).

4. **REQUIREMENT OF BOND—ABUSE OF DISCRETION.**—The appointment of a receiver to take the property and business out of the hands of a person in possession, and claiming ownership thereof, without requiring a bond from the plaintiff, is, in most cases, a gross abuse of discretion.—*Id.*
5. **UNAUTHORIZED RECEIVERSHIP OF CORPORATION—PROHIBITION.**—In the absence of statutory authority, a receiver cannot be appointed during the pendency of an action to displace the management of the corporation by its directors; and there is no statutory authority under section 564 of the Code of Civil Procedure, or any other provision of the code, or any legislative enactment, to seize the property of the corporation out of the hands of the constituted management, and place it in the hands of a receiver during the pendency of an action; and prohibition is the proper remedy to prevent the attempted exercise of such receivership.—*Id.*
6. **CORPORATION FORMED BY PARTNERSHIP—RULE AS TO RECEIVERSHIP UNCHANGED.**—Where the complaint upon which the receiver was appointed shows the organization of a corporation, and a conveyance to it of all the mining property owned by the partnership, and the issuance of shares to the corporation through the several partners, and that the corporation has carried on the business of operating the mines, and has the legal title thereto and right to possession thereof, an averment that the corporation is a mere medium of the partnership, and not an independent corporation, and that the fraud was committed by one of the members of the partnership upon another in the distribution of the shares of the corporation, does not change the rule that the court has no power to take the control of the property and business of the corporation out of the corporate management and give it to a receiver; nor is any new power given the court by the averments of the complaint.—*Id.*
7. **INJUNCTION AGAINST WITHDRAWING OF MONEYS OF CORPORATION—REMEDY—MOTION—APPEAL—PROHIBITION.**—An injunction to restrain a corporation and its officers from withdrawing moneys deposited in certain banks in the name of the corporation, or in the name of a receiver appointed in another action, and from selling any of the mines of the corporation, or any interest therein, although granted without notice, does not have the effect to suspend the general and ordinary business of the corporation, and the remedy therefor is by motion in the superior court to dissolve the injunction, and an appeal from the order denying the motion; and its enforcement cannot be prevented by a writ of prohibition.—*Id.*

See CERTIORARI, 1, 3; PARTNERSHIP, 4, 5; PROHIBITION, 2.

**REDEMPTION.** See INTEREST, 1; STATUTE OF LIMITATIONS, 2, 3.

**RES ADJUDICATA.** See NUISANCE, 1, 3.

**RESCISSION.** See UNDUE INFLUENCE; VENDOR AND VENDER, 1.

**RESTRAINT ON ALIENATION.**

1. **GIFT FROM SON TO MOTHER—CONTRACT IN RESTRAINT OF ALIENATION—VOID CONDITION.**—Where a son purchases land which is

## RESTRAINT ON ALIENATION (Continued).

conveyed to his mother as a gift, a subsequent contract reciting such acquisition of the land by her, and that the purchase money for the same was furnished as a gift by the son, and containing a covenant that the land should not be sold or conveyed without his consent, and that he was to be the manager thereof for her benefit, and that upon her death it was to be divided between her lawful heirs, is void as imposing a restraint upon alienation repugnant to the interest created in the property, and a subsequent conveyance from the mother to her daughter in consideration of love and affection, to the exclusion of her son, conveys the entire title to the daughter.—*Prey v. Stanley*, 423.

2. PUBLIC POLICY—No ESTOPPEL BY INVALID CONTRACT.—The restraint sought to be imposed upon the mother's power of alienation being void as against the policy of the law, the daughter's assent thereto by her signature to the contract cannot estop her to allege its invalidity.—*Id.*

RESTRAINT OF TRADE. See SALE, 3-8.

RIGHT OF WAY. See EASEMENT, 4, 5; ROADS AND HIGHWAYS.

## ROADS AND HIGHWAYS.

1. HIGHWAY—CONDEMNATION OF RIGHT OF WAY—PLEADING—MORE PRACTICABLE ROUTE—INSUFFICIENT ANSWER.—In an action by a county to condemn a right of way for a public highway over the lands of defendant, by a route determined upon by the board of supervisors upon approving the report of viewers of the road, affirmative matter in the answer setting up a petition for a road over a different route upon which other viewers had reported favorably, but which the board of supervisors had rejected and refused to grant the prayer of the petition, and that the route so petitioned for forms a more direct and practicable route, and of cheaper construction than that set up in the complaint, is insufficient to constitute a defense to the action, and is properly stricken out.—*County of Siskiyou v. Gamlich*, 94.
2. JURISDICTION OF BOARD OF SUPERVISORS—APPROVAL OF REPORT OF VIEWERS—COLLATERAL ATTACK.—The board of supervisors has jurisdiction to determine whether a new road is necessary or not, and, if necessary, over what route it shall be laid out and constructed; and, in laying out a public road, the board exercises judicial functions, and its order approving the report of viewers cannot be collaterally attacked on the ground that it was made upon insufficient evidence.—*Id.*
3. EVIDENCE—PETITION FOR ROAD—TESTIMONY OF SUPERVISOR—FINDING AS TO QUALIFICATION OF PETITIONER—COLLATERAL ATTACK.—The petition upon which the road was established by the supervisors is admissible in evidence, and the testimony of one of the supervisors is admissible to identify the petition as the one presented to and acted upon by the board, and, if it sets forth that the parties who signed it were all freeholders of the road district, and taxable therein for road purposes, the action of the board in establishing the road is conclusive that the statements in the petition were found to be true as to the qualification of the petitioners as against a collateral attack.—*Id.*
4. SUFFICIENCY OF PROOF—NONSUIT.—In an action to condemn a right of way for a road, a *prima facie* case is established by pro-



## ROADS AND HIGHWAYS (Continued).

ing the presentation of a regular petition to the board of supervisors with a good and sufficient bond, the record of the board showing the appointment of viewers, the report of the viewers in proper form, and its approval, the assessment of damages, and the setting apart out of the proper fund of the money awarded defendant, his refusal for ten days to accept the same, and the order to commence suit for condemnation, and, when these facts are proved, a motion for a nonsuit is properly denied.—*Id.*

5. **RECORD OF SUPERVISORS—ABSENCE OF FINDING—PRESUMPTION OF REGULARITY—BURDEN OF PROOF.**—The mere absence from the record of the board of supervisors of an affirmative finding that the board approved the bond, and found that the signers of the petition were freeholders within the road district, does not prove that they did not so find; but the presumption is in favor of the regularity of the action of the board, and the burden is on the defendant to show affirmatively the contrary.—*Id.*
6. **INADMISSIBLE EVIDENCE—BETTER ROUTE.**—An offer of the defendant to prove a shorter and more practicable route than the one sought to be condemned is properly rejected as inadmissible.—*Id.*
7. **AGE OF PETITIONERS—PROOF BEFORE SUPERVISORS.**—Where there is no suggestion or claim that any of the signers to the petition were minors, proof of their age or ages before the board of supervisors is not required, and testimony as to whether the board took or heard any evidence as to their age or ages is properly excluded.—*Id.*
8. **PROOF OF DAMAGES—TESTIMONY OF SUPERVISORS.**—The supervisors who acted upon the petition are competent as witnesses to testify as to the damages sustained by the defendant, and their testimony cannot be rejected upon the ground that their records are the best evidence of their determination as to damages.—*Id.*

See NEGLIGENCE, 19-21.

## SALE.

1. **GOOD WILL—WRITTEN CONTRACT—ESTOPPEL OF MARRIED WOMAN AS VENDOR.**—Where a husband and wife join in the sale of a business and goodwill, and they both covenant and agree with the vendees that neither of them will engage in or carry on a like business in the city where the business was conducted, the wife is estopped by the written contract of sale executed by her from denying her interest or title in the business or goodwill sold. *Potter v. Ahern*, 674.
2. **EVIDENCE OF OWNERSHIP—CONFLICT.**—Where the evidence showed that the wife assisted her husband in carrying on the business sold, that they were apparently conducting it together, and that the business was community property, such evidence, taken in connection with her execution of the contract of sale jointly with her husband, is evidence tending to show ownership in her; and the testimony of the defendants that she was not interested in the property or the sale simply raised a conflict, which it was the province of the trial court to determine.—*Id.*
3. **STIPULATION FOR LIQUIDATED DAMAGES—EVIDENCE—BREACH OF CONTRACT.**—A contract for the sale of a business and goodwill, containing a covenant of the vendors not to engage in a like

## SALE (Continued).

business in the same city, may properly stipulate a specified sum as liquidated damages for breach of the covenant, and such stipulation is not to be construed as a penalty; but the evident intention of the parties must control, and the plaintiff is not required to prove anything more than a breach of the contract in order to recover the stipulated damages.—*Id.*

4. **RECOVERY BY REMAINING PARTNER—CONSTRUCTION OF CONTRACT.**—Where the covenant not to engage in business was made with the vendees as partners, and expressly provided that in case of dissolution of the partnership the covenant should inure to the benefit of the remaining partner, and, in case of a sale of the business by the partnership, should inure to the benefit of their assigns, the provision cannot be limited to a stipulation to pay the partners jointly, or the assigns of both of them; but it inures by its terms to the remaining partner in case of dissolution of the firm, and such remaining partner may recover the stipulated damages without an assignment from the firm.—*Id.*
5. **GOODWILL—RESTRAINT OF TRADE—FRAUD—STATUTE OF LIMITATIONS.** The seller of a medical compound and of the goodwill of the business, who agrees in the contract of sale not to manufacture or sell the compound within a particular county, is guilty of fraud in secretly and clandestinely manufacturing and selling the identical compound by a different name, and through the instrumentality of a third person, and the statute of limitations does not commence to run against the right of the purchaser to enjoin the violation of the contract and to recover damages for the fraudulent breach thereof, until the discovery by him of the facts constituting the fraud.—*Gregory v. Spieker*, 150.
6. **COVENANT FOR LIMITED RESTRAINT OF TRADE.**—Under sections 1673 and 1674 of the Civil Code, a provision in a contract of sale of the goodwill of a business, by the terms of which the seller agrees not to engage in the business in a particular county, without limiting his covenant to the time during which the buyer might carry on the business, is not entirely void, but is binding on and enforceable against the seller so long as the buyer or any person deriving title from him carries on a like business in the county.—*Id.*
7. **CONSTRUCTION OF CONTRACT—INJURY TO GOODWILL.**—A contract of sale whereby the seller transfers "all right, title, and goodwill of the bitters known as Robert's Kidney and Liver Bitters," and covenants "not to manufacture or sell any of said Robert's Bitters" in a specified county, is a sale of the liquid known when compounded as Robert's Bitters, and not merely of the name by which it was known; and representing to the buyer's customers that the same preparation by a different name was superior to Robert's Bitters, tends to injure the goodwill of the business.—*Id.*
8. **MEASURE OF DAMAGES.**—In an action by the buyer to recover damages for such a breach of the contract of sale, where there has been no infringement of a trademark, the measure of damages is the value of the business lost to the buyer, and not the gain to the seller.—*Id.*
9. **SALE OF LIQUOR SALOON—PAYMENT UPON PROCUREMENT OF LICENSE—RECOVERY OF DEPOSIT—PLEADING.**—Where personal property, consisting of all of the goods owned by the vendor in a retail liquor saloon, is sold for an agreed price, and as a further and sepa-

## SALE (Continued.)

rate agreement between the parties, the purchaser agrees to deposit with third parties an additional sum to be paid to the vendor upon the procurement of the right to sell and carry on a retail liquor business within the saloon, a complaint by the assignee of the vendor to recover the amount of the deposit is insufficient if it does not aver that the vendee procured the right to carry on the business, or could carry on the business without the procurement of the license, or that by his own neglect or default he had failed to secure the privilege.—*Kiefer v. Laventhal*, 667.

10. CONSTRUCTION OF CONTRACT—CONDITION AS TO OBTAINING LICENSE.—Such contract of sale is to be construed as an agreement to pay a fixed price for the personal property owned by the vendor in the saloon, and to pay the additional sum when and if the vendee obtained a license to conduct the business; and if he succeeded, his liability was complete, but if he failed, then he owned the property for which he had paid the price, and the transaction was at an end.—*Id.*

SAN FRANCISCO. See NEW CITY HALL; PUBLIC OFFICERS, 4, 5; TAXATION.

SHERIFF. See SUMMONS, 1, 2.

## SLANDER.

CHARGE OF THEFT—ADMISSIONS OF DEFENDANT—INSTRUCTION INAPPLICABLE TO EVIDENCE.—In an action of slander for accusing the plaintiff of theft, where there is no evidence that the plaintiff confessed to the theft to the defendant, an instruction to the jury that if they believed from the evidence that the plaintiff stated to the defendant that he had stolen the articles mentioned in plaintiff's complaint, and that defendant without malice made the statements charged in pursuance of such belief, if he did make them, the plaintiff cannot be heard to complain, is improper as being inapplicable to the evidence, and, if given, must be deemed prejudicial to the plaintiff, where the verdict of the jury and the judgment of the court were in favor of the defendant; and a new trial may properly be granted for error in the giving of such instruction.—*Chisholm v. Keyfauver*, 102.

STAKEHOLDER. See WAGER.

STATUTE OF FRAUDS. See TRUST, 1.

## STATUTE OF LIMITATIONS.

1. RIGHT TO CONTRIBUTION.—A co-obligor acquires a right to contribution as soon as he pays more than his share of obligation, but not until then; and, consequently, the statute of limitations does not begin to run until such payment is made; and the liability of a co-obligor to contribution, where not founded upon an instrument in writing, is governed by the first subdivision of section 339 of the Code of Civil Procedure, and is barred in two years.—*Richter v. Henningsan*, 530.
2. CONDITION OF REDEMPTION.—The fact that the debt is barred by the statute of limitations does not absolve the mortgagor who had

## STATUTE OF LIMITATIONS (Continued).

redeemed the mortgaged property from paying the debt as a condition of redemption.—*Boyce v. Fisk*, 107.

3. ACTION TO QUIET TITLE—FORM OF JUDGMENT ALLOWING REDEMPTION—REMEDY FOR OUTLAWED DEBT—DISMISSAL—BAR OF PLAINTIFF'S RIGHT.—In an action to quiet the title of the plaintiff to land which had been conveyed to the defendant as a mortgage security to pay a note which had been barred by the statute of limitations, although the plaintiff cannot have his title quieted while the money for which the mortgage was given remains unpaid, and the court may provide by its judgment for the payment of the amount due, yet the defendant cannot have any affirmative remedy for his outlawed debt, and the only proper judgment would be that upon the failure of the plaintiff to pay the amount remaining unpaid upon the mortgage debt within a time specified by the court, the action should be dismissed, and it is erroneous to adjudge that upon the failure of the plaintiff to pay that amount, all his right and title to the mortgaged premises shall cease and determine, and that the title of the defendant thereto shall be good and valid, and that plaintiff shall be barred from asserting any claim, interest, or title to the premises.—*Id.*
4. WAIVER OF STATUTE OF LIMITATIONS—ESTATES OF DECEASED PERSONS—POWER OF ADMINISTRATOR.—An administrator will not be permitted to waive the statute of limitations upon a claim which is barred by the statute of limitations, and he does not waive such claim, nor the presentation of it against the estate, by bringing an action to quiet the title of the estate as against one to whom the decedent had conveyed his land to secure a debt which is barred by the statute of limitations.—*Id.*
5. QUIETING TITLE—CROSS-COMPLAINT—FRAUDULENT DEED—UNDUE INFLUENCE—UN SOUND MIND—PLEADING—DISCOVERY.—In an action to quiet title against the heirs of plaintiff's grantor, a cross-complaint alleging that the deed under which the plaintiff claims was obtained by undue influence at a time more than ten years prior to the filing of the cross-complaint, when the grantor was, from disease, old age, ignorance, weakness of mind and body, and from such undue influence, mentally incompetent to manage her property, or to transact any business, and that she was then and for a long time prior thereto had been of unsound mind, and seeking to cancel the deed, but which does not allege any date at which the fraud and undue influence was discovered, is subject to a demurrer upon the ground that the cause of action therein stated is barred by the provisions of subdivision 4 of section 338 of the Code of Civil Procedure.—*Castro v. Geil*, 292.
6. ALLEGATION OF DISCOVERY NECESSARY.—In an action to set aside a deed on the ground of fraud, when the acts constituting the fraud occurred more than three years before the commencement of the action, the plaintiff must allege the discovery thereof within three years, in order to avoid the bar of the statute.—*Id.*
7. DEED—UN SOUND MIND OF GRANTOR—VESTING OF TITLE—VOIDABILITY—PLEADING—LIMITATION OF ACTION.—A deed of a person of unsound mind, who is not under guardianship, vests a title, and is merely voidable, and not void; and the title cannot be divested otherwise than by judicial action, or the voluntary con-

## STATUTE OF LIMITATIONS (Continued).

veyance of the grantee; and in an action to avoid it, the complaint must show upon its face that the action is not barred by the statute of limitations.

**1D.—EQUITY CASES—LACHES.**—The statute of limitations relating to a cause of action for relief upon the ground of fraud applies to equity cases; and where the statute is applicable the doctrine of laches, as applied in equity, need not be considered.—*Id.*

**9. RUNNING OF STATUTE—MINOR HEIRS—SUBSEQUENT DISABILITY.**—Where the parents, through whom minor heirs claim, were in life when the statute of limitations began to run against a cause of action to set aside a conveyance for fraud and undue influence, the subsequent disability of the minor children who were not heirs of the grantor when the deed was made does not stop the running of the statute, which commenced to run against their parents.—*Id.*

See ACCOUNTING, 2, 4; BOUNDARIES, 3; PLEADING, 5; SALE, 5; TRUSTS, 3, 4.

**SPECIFIC PERFORMANCE.** See PLEDGE, 1, 3.

**STOCK AND STOCKHOLDERS.** See CORPORATIONS.

## STREET ASSESSMENT.

**1. PROTEST OF OWNERS—CONSTRUCTION OF STATUTE.**—Under the Street Improvement Act of 1885, as amended in 1891, the city council has authority to order the grading or other improvement of one of two adjoining ungraded blocks intervening between and bounded at each end by graded blocks, notwithstanding the protest of the owners of a majority of the frontage of the property fronting on the proposed work or improvement; and it is not necessary that the whole intervening unimproved space must have been improved under one resolution of intention and one contract; but the council has authority to order the whole or any part of the intervening ungraded blocks to be graded or improved, regardless of objections by owners of lots fronting on the proposed improvement.—*Smith v. Hazard*, 145.

**2. COMPLETION OF WORK—SLIGHT DEFECT—APPEAL TO COUNCIL.**—The only remedy for a slight defect in the work at the time of its acceptance by the superintendent of streets, in leaving a narrow strip ungraded, which was afterward graded by the owner of the lot, is by an appeal to the city council, and it cannot be objected to in an action to recover a street assessment for work done under the contract.—*Id.*

**3. PUBLICATION OF RESOLUTION OF INTENTION—INSERTION ON SUNDAY.**—Under section 3 of the Street Improvement Act, requiring the resolution of intention to be published by two insertions in one or more daily, semi-weekly, or weekly newspapers published and circulated in the city, the publication of the resolution on Saturday and Sunday consecutively in a daily newspaper published and circulated in the city, is a liberal compliance with the statute, which does not except Sundays, and the publication is sufficient.—*Id.*

**4. LIEN IN INVITUM—STRICT COMPLIANCE WITH STATUTE—EQUITIES OF CLAIMANT.**—In order to fix upon property the lien of a street assessment, every requirement of the statute that could be of benefit to the person to be charged with the lien must be strictly com-

## STREET ASSESSMENT (Continued).

- plied with; nor can the equities of the claimant be regarded where there is no such compliance.—*Schwiesau v. Mahon*, 543.
5. **NECESSITY OF WRITTEN CONTRACT—ABSENCE OF SPECIFICATIONS—VOID CONTRACT—NO LIEN FOR PROPER WORK.**—The statute requires the contract to be in writing, and signed by the contractor; and, where the contract signed does not define the work to be done, nor refer to any specifications in which it is described, there is no valid contract for the work, and therefore no valid lien of a street assessment, although the work may have been done strictly in accordance with the specifications referred to in the advertisement for bids.—*Id.*
  6. **INSUFFICIENCY OF BOND—OBLIGATION OF SURETIES—CORRECTION OF CONTRACT UPON APPEAL.**—The bond required of the contractor, to be valid, must be conditioned that the contractor will perform the contract entered into by him, and a defect in the contract as to specifications for the work cannot be corrected by an appeal to the board, which cannot provide sureties for its performance, without which there can be no binding contract; and the original sureties are entitled to stand upon the letter of the original contract, and cannot be bound by any correction thereof upon appeal.—*Id.*
  7. **STREET WORK—PRIVATE CONTRACT—ACTION BY ASSIGNEE—PLEADING—EVIDENCE—VARIANCE—UNCERTAINTY OF CONTRACT.**—In an action to foreclose a lien for street work under a private contract, which had been assigned to the plaintiff, where the contract and the contents of the lien are pleaded merely according to their legal effect, and the complaint counts upon a contract to grade the south half of a street between certain cross streets, a contract offered in evidence which merely provides for the grading of one-half of the street, but is silent as to which half is to be graded, it is too uncertain and indefinite to be admissible in evidence under the allegations of the complaint.—*Rauer v. Fay*, 361.
  8. **RIGHT OF LIEN NOT ASSIGNABLE—WORK DONE BY ASSIGNOR—OMISSION OF MATERIAL FINDING.**—Although a perfected lien may be assigned, the mere right to a lien in the present or future is not assignable; and in an action by an assignee to foreclose a lien, where the evidence established without contradiction that part of the work of grading upon which plaintiff claims a lien was performed by his assignor before the assignment, and the answer raises an issue upon that question, such issue is material, and a failure to find thereon is ground of reversal of a judgment in favor of the assignee.—*Id.*
  9. **CONDITIONAL NEW TRIAL ORDER—REMISSION OF PART OF RECOVERY—SILENCE OF RECORD—PRESUMPTION.**—Where the court below denied a motion for a new trial upon condition that plaintiff should remit ten per cent of the amount of his recovery, if the record is silent as to the cause of the remission, it cannot be presumed that the reduction was on account of labor performed by the plaintiff's assignor, where the evidence shows that a portion of the work was never completed, and the remission might have been made on that account.—*Id.*
  10. **EVIDENCE—RELEASE BY CONTRACTOR AT TIME OF CONTRACT.**—A paper executed simultaneously with the contract relied upon by the plaintiff, in which the contractor certified that he had no claim

## STREET ASSESSMENT (Continued).

upon the defendant for any work performed on the street in question by another person named, or by himself or assigns, in doing the balance of grading on the street, such agreement is admissible in evidence for the purpose of showing that it was the intention of the contractor to release the plaintiff from all liability. *Id.*

11. **OBJECT OF CONTRACT—NOMINAL SIGNATURE—KNOWLEDGE OF CONTRACTORS—FRAUD—PROVINCE OF COURT.**—If the contract was signed by the defendant only as a nominal party to enable the parties in interest to secure a sufficient number or proportion of the landowners on the block to obtain a permit from the superintendent of streets to make the improvement, and this was done with the knowledge and consent of the other contractors, it would not be a fraud upon them; but if it was a secret or side agreement between the contractor and defendant, made in fraud of the rights of the other contracting parties, the court may investigate and determine that question.—*Id.*
12. **RIGHTS OF ASSIGNEE—KNOWLEDGE OF RELEASE.**—An assignee of the contract for street work takes such contract *cum onere*, subject only to the duty of defendant to notify him of any conditions not specified in the contract itself, and the mere fact that the plaintiff was not aware of a release of the defendant at the time he took an assignment of the contract is of no moment.—*Id.*
13. **NOTICE OF LIEN—SUBSTANTIAL COMPLIANCE WITH STATUTE.**—Where a notice of lien as filed complies substantially with the requirements of the statute it is sufficient.—*Id.*
14. **LIEN UPON LOT FOR GRADING—CONSTRUCTION OF CODE.**—The lot upon which a lien is authorized by section 1191 of the Code of Civil Procedure for grading or other improvement of the lot, is not limited to any artificial subdivision or official designation of a lot upon a map, but includes in its meaning whatever territory is caused by the owner thereof to be graded under a single contract.—*Warren v. Hopkins*, 506.
15. **CONTRACT FOR GRADING STREETS—PRIORITY OF MORTGAGE—GRADING OF BLOCK.**—Where a contract for grading streets in front of a block is made subsequent to the recordation of a mortgage upon the block, the lien for the grading of the streets is subordinate to the lien of the mortgage, though the mortgage may be subject to a lien for the grading of the block.—*Id.*
16. **FINDINGS—UNCERTAINTY—CONSTRUCTION IN SUPPORT OF JUDGMENT.**—Any uncertainty in the findings is to be construed so as to support the judgment rather than to defeat it; and a finding that a certain amount was unpaid under contracts for grading blocks and streets surrounding the same, and does not find that any portion of the unpaid sum was for grading the streets, must be read as a finding that the entire amount is due upon the contract for grading the blocks as against the holder of a mortgage upon one of the blocks, and where such mortgagee has not assigned any error in the finding, it must be presumed to be authorized by the evidence, and to be of such a character as to sustain the judgment.—*Id.*

STREETS. See ROADS AND HIGHWAYS.

SUCCESSION. See ESTATES OF DECEASED PERSONS, 10, 11.

## SUMMONS.

1. **SERVICE BY PERSON OTHER THAN SHERIFF—CONSTITUTIONAL LAW.**—Section 410 of the Code of Civil Procedure, which authorizes service of summons by a person other than the sheriff, is not in conflict with the general law in regard to the service of process and notices by the sheriff, and is not in violation of section 25 of article IV of the constitution.—*Hibernia Savings and Loan Society v. Clarke*, 27.
2. **DUTY OF SHERIFF.**—The code provision defining the duties of a sheriff does not give to or impose upon him exclusively the duty of serving all process and notices, but merely requires of him to serve all notices and process directed to him or placed in his hands for service.—*Id.*
3. **REPEAL OF CODE—COUNTY GOVERNMENT ACT—RE-ENACTMENT.**—Section 410 of the Code of Civil Procedure was not repealed by the County Government Act, but was amended and re-enacted in 1893.—*Id.*
4. **FILING OF AFFIDAVIT OF SERVICE.**—Where a summons is returned to the office of the clerk with an affidavit of its service attached or annexed thereto, the filing of the summons is sufficient, and it is not necessary that there be a separate filing of the affidavit.—*Id.*
5. **PROOF OF SERVICE UPON CORPORATION—SUFFICIENCY OF AFFIDAVIT.**—In an action against a corporation, an affidavit of service of summons stating that it was personally served upon a designated person, described as the managing agent of the corporation, by delivering to such managing agent personally a copy of the summons attached to a copy of the complaint, sufficiently shows that the service was made upon the corporation, and is *prima facie* proof that the person served was its managing agent upon whom the summons was authorized to be served for the corporation.—*Keener v. Eagle Land and Irrigation Company*, 627.
6. **SUFFICIENCY OF SUMMONS—REPRESENTATIVE CAPACITY OF ADMINISTRATOR—REFERENCE TO COMPLAINT.**—In an action to foreclose a mortgage, in which one of the defendants is described by name in the summons with the appended words "administrator with the will annexed," etc., of a deceased person named, and the summons refers to the complaint for further particulars, in which it is alleged that such defendant, "as administrator, etc., has or claims to have an interest in the mortgaged premises, subject and subsequent to the lien of the mortgage," the summons is not defective upon the ground that it does not show that such administrator was sued in his representative capacity.—*Ryan v. Holliday*, 335.

See DIVORCE.

SUPERIOR COURT. See COURTS.

## SURETY.

1. **PROMISSORY NOTE—SIGNATURE OF SURETY AFTER LOAN OF MONEY—CONSIDERATION.**—Where the payee of a note parts with his money on the faith of a promise by the borrower that he will procure the signature of a surety to the note, the surety is bound, although he does not sign the note until the money is advanced.—*Pauly v. Murray*, 13.
2. **SURRENDER OF JOINT NOTE—CONSIDERATION FOR INDIVIDUAL NOTE.** Where there is a sufficient consideration for a joint note signed



## SURETY (Continued).

by one of the makers as a surety, the surrender thereof to the surety is a sufficient consideration for the individual note of the surety to the payee.—*Id.*

3. DISCHARGE OF SURETY IN PART.—Where a surety is bound by one bond for the performance by the principal of two distinct things, and the contract is varied as to one of the things to be performed, the surety is discharged as to the matter concerning which the contract has been changed, but is not discharged from that as to which it has not been changed.—*Parke & Lacy Co. v. White R. L. Co.*, 658.

See APPEAL, 19-21; EXECUTION; INJUNCTION; MORTGAGE, 1-3.

## SURVEY.

1. COUNTY BOUNDARY—SURVEY UNDER DIRECTION OF SURVEYOR GENERAL—LIABILITY OF COUNTY.—Where a survey of a county boundary is made by a surveyor authorized by the surveyor general to make it, and is officially sanctioned and approved by the surveyor general, the survey becomes his act, and is made by the surveyor general within the meaning of sections 483 and 3969 of the Political Code, although the surveyor making the survey is not a deputy surveyor general; and each of the counties adjoining upon the boundary is liable to the surveyor appointed by the surveyor general for its proportionate share of the cost of surveying and definitely marking out the boundary line.—*Rice v. Trinity County*, 247.
2. AUTHORITY OF SURVEYOR GENERAL—AGENCY FOR STATE—DELEGATION OF MECHANICAL AND FIELD WORK.—The law, in casting upon the surveyor general the duty of making public surveys, clothes him with the requisite power to enable him to perform that duty, and it is competent for him to employ surveyors and other functionaries usual and necessary in running the lines and doing the detail work required, and he is the agent of the state for the making of such surveys, and may delegate the mechanical part of the work to others, nor is it necessary that the field work should be done by or under the direct supervision of a deputy.—*Id.*

See BOUNDARIES, 2, 3.

## TAXATION.

MUNICIPAL CORPORATIONS—TAXATION—POWER OF SUPERVISORS—VETO OF MAYOR.—Under the present statutory law, the board of supervisors of the city and county of San Francisco have the power to fix the rate of taxation, and the mayor has no veto of their action in that matter.—*Truman v. Board of Supervisors*.

See MORTGAGE, 15-16.

TELEPHONE. See NEGLIGENCE, 7.

TENANTS IN COMMON. See DIVORCE, 4; HOMESTEAD, 1.

TORT. See JUDGMENT, 10-13.

## TOWNSITE.

**QUIETING TITLE—EVIDENCE—TOWNSITE PATENT—TRUST FOR OCCUPANTS****—PROOF OF OCCUPANCY—DEED OF SUPERIOR JUDGE NOT CONCLUSIVE.**

In an action to quiet title, where the land in controversy is part of a townsite, which was surveyed and platted under section 2387 of the Revised Statutes of the United States, and a patent was issued therefor to the superior judge, in trust for the occupants, which trust was administered by the superior judge under the act of the legislature of California, approved March 30, 1868, and the amendments thereof, a deed of the superior judge to the plaintiff, in so far as it includes land which had never been in the occupancy of the plaintiff, but which is shown to have been, at the time of the patent and prior to the application therefor, in the occupancy of the defendant, is not conclusive against the defendant; and the defendant is entitled to prove his occupancy and his right thereto as against the plaintiff.—*Biddick v. Kobler*, 191.

## TRUST.

1. **STATUTE OF FRAUDS—VERBAL AGREEMENT.**—A verbal agreement between a mother and son that he and his family should live with her on premises which she had bought and paid for with her own money, and that he should have the title thereto after her death, provided that he would pay the taxes and insurance on the property and keep the house in good repair, and would furnish her with all necessary care and with board and lodging during her life, does not, upon the performance of the conditions, raise a constructive trust which is excepted from the rule that a trust in realty can only be created by an instrument in writing, and the alleged verbal agreement cannot be enforced as against a mortgage executed by the mother for money loaned, although the mortgagee had notice of the verbal agreement.—*Wittenbrock v. Cass*, 1.
2. **ESTATES OF DECEASED PERSONS—PRESENTATION OF CLAIM.**—While equity will enforce a trust against the personal representatives of a deceased person without a presentation of a claim against the estate, when the identical trust property or its product in a new form can be traced into the estate, and so into the possession of the representatives of the decedent, yet a beneficiary who is unable to do this must rely on the personal liability of the trustee, and has only a claim against the estate which must be duly presented for allowance.—*McGrath v. Carroll*, 79.
3. **TRUST CLAIM—WHEN LIMITATION BEGINS TO RUN.**—Where a trust claim has not been repudiated during the lifetime of the trustee, the statute of limitations is set in motion from the time of the first publication of notice to creditors.—*Id.*
4. **PRESENTATION OF TRUST CLAIM—MONEY DEMAND—STATUTE OF LIMITATIONS.**—The fact that the beneficiary is obliged to present his claim as a general creditor against the estate of a deceased person does not change the nature of his demand, which is still one for property due under a trust accounting, but merely changes his remedy; and in presenting such claim, in order to avoid the statute of limitations, he must set forth in the claim the facts constituting the trust, and that the trustee did not repudiate the same to the knowledge of the beneficiary; but where the claim as presented is of a mere money demand which is barred upon

## TRUST (Continued).

its face by the statute of limitations, it is the duty of the executors to reject the claim, and the claimant cannot prevent the bar of the statute by setting forth a trust claim in his complaint.—*Id.*

See JUDGMENT, 1; PLEADINGS, 5; TOWNSITE.

## UNDERTAKINGS. See BOND.

## UNDUE INFLUENCE.

1. CONTRACTS—TRANSFER OF STOCK—EXCLUSIVE REMEDY—RESCISSION—DAMAGES NOT RECOVERABLE.—Where a plaintiff has been led solely through the undue influence of the defendant to transfer stock in a corporation to the defendant for an inadequate consideration, the exclusive remedy in such a case is a prompt rescission of the contract, or an offer to rescind it, so as to put the other party *in statu quo*; and if he fails to rescind promptly, he thereby affirms the contract, and cannot maintain an action for damages upon the ground of undue influence in procuring the transfer.—*Bancroft v. Bancroft*, 374.
2. DISTINCTION BETWEEN FRAUD AND UNDUE INFLUENCE—REMEDY.—Where a contract was induced by fraud, the injured party may affirm the contract and recover damages in an action for deceit according to the terms upon which he was led to believe that he was contracting; but where the terms of the contract are perfectly understood, but assented to only because of the exercise of duress, menace, or undue influence, an affirmance being necessarily of the terms of the contract as they were understood when it was made, if those terms are fully complied with, there is nothing due upon the contract, and there can be no cause of action for damages.—*Id.*
3. EFFECT OF UNDUE INFLUENCE—TRANSFER NOT VOID, BUT VOIDABLE. A contract of transfer is not rendered void by undue influence, but is only voidable upon restoration of the consideration paid at the option of the party aggrieved; and by failing to exercise the option to rescind it within a reasonable time, the contract is affirmed.—*Id.*

See STATUTE OF LIMITATIONS, 5-9.

## UNLAWFUL DETAINER. See LANDLORD AND TENANT, 4.

## VAGRANCY. See POLICE COURT, 1, 2.

## VENDOR AND VENDEE.

1. CONVEYANCE OF LAND—MISTAKE OF VENDOR—FRAUD OF VENDEES—RESCISSION.—Where the vendor of a lot, by mistake of fact, believing that it was mortgaged for \$500, whereas such mortgage was only upon another lot, offered to sell it for \$200 in cash, and the balance of \$500 to be paid upon the mortgage, and the vendees, upon inquiry, learning that the mortgage did not include the lot offered to be sold, and with intent to defraud the vendor of \$500, paid the purchase price of \$200 cash, and received the conveyance of the land, and, upon discovery of the mistake by the vendor, and a demand by him that the \$500 be paid to him or to his mortgagee, in satisfaction of the mortgage, upon

## VENDOR AND VENDEE (Continued).

the other lot, the vendees refused to make such payment, whereupon the vendor tendered back the money, with interest, and demanded a reconveyance, which tender and demand were also refused, the vendor is entitled to have the contract set aside in a court of equity, and the property reconveyed.—*Conlan v. Sullivan*, 624.

2. **EXPENDITURE OF MONEY BY VENDEES—INCREASE OF VALUE—FINDINGS—PLEADING.**—Where the court finds that the vendees expended money upon the property purchased, but made no finding as to the increased value of the property by reason of the expenditure, and there is no allegation in the answer that such expenditure had increased the value of the realty, the vendees are not entitled to a reimbursement of the amount expended.—*Id.*

## WAGER.

1. **REPUDIATION BEFORE DECISION—RECOVERY FROM STAKEHOLDER.**—Where a wager upon the result of a horserace is repudiated, and notice of the repudiation given to the stakeholder before the race is run and the wager decided, the stakeholder is bound to deliver the stake deposited with him by the party repudiating the wager to such party, and he may recover the same from the stakeholder, though subsequently paid over to the winning party.—*Wise v. Rose*, 159.
2. **PLEADING—INSUFFICIENCY OF DENIAL.**—Where the complaint avers that notice of repudiation was given before the race was run, an answer admitting that the notice was given, but stating that the defendant cannot positively say whether it was received prior to the time when the event occurred, or prior to the time when the wager was decided, does not deny the averment of the complaint that he had notice of the repudiation before the race was run, and before it was known, or could have been known, whether plaintiff had won or lost the wager.—*Id.*
3. **EVIDENCE—REGULATIONS OF TURF.**—The regulations and usages of the turf are subject to the laws of the state, and it is not admissible to prove that the words "play or pay," in a written agreement of wager upon a horserace, mean that, after the stakes were placed, neither party could repudiate the wager without the consent of the other, even though one of the horses should die before the day set for the race.—*Id.*

WAREHOUSEMAN. See COMMON CARRIER, 4, 9, 10, 13.

## WATER AND WATER RIGHTS.

1. **APPROPRIATION—EXCESS OF WATER—FINDING AGAINST EVIDENCE.**—Where the plaintiff claims the waters of a creek by virtue of a prior appropriation, and the defendant by a subsequent diversion and prescriptive right, a finding that, during the time the defendant has diverted the water, an excess has flowed in the creek above the capacity of both ditches, is not sufficiently supported by the mere observation of the trial judge who visited the premises once near the close of the rainy season, just prior to the judgment, where the other uncontradicted evidence adduced upon the trial shows that all of the water of the creek was taken in one of the ditches during one season.—*Smith v. Hawkins*, 122.

## WATER AND WATER RIGHTS (Continued).

2. **RIGHTS OF APPROPRIATOR OF WATER—LICENSE—EASEMENT—CONGRESSIONAL GRANT.**—An appropriator of water which is conveyed across the public domain is a licensee of the general government; but when such part of the public domain passes into private ownership, it is burdened by the easement granted by the United States to the appropriator, who holds his rights against the land under an express grant of Congress by the act of 1866.—*Id.*
3. **ACQUISITION OF PRESCRIPTIVE RIGHT.**—A prescriptive right cannot be acquired against the United States, and can be acquired only by one claimant against another private individual; and one who claims a right by prescription must use the water continuously, uninterruptedly, and adversely for a period of at least five years, after which time the law will conclusively presume an antecedent grant to him of his asserted right.—*Id.*
4. **CONSTRUCTION OF CODE—EXTINGUISHMENT OF SERVITUDE ACQUIRED BY ENJOYMENT—PRESCRIPTIVE RIGHT.**—Section 811 of the Civil Code, which provides that when a servitude is acquired by enjoyment, disuse thereof by the owner of the servitude for the period prescribed for acquiring title by enjoyment extinguishes the servitude, deals only with the extinguishment of servitudes resting upon prescriptive right, and not of one conferred by express grant from the United States to a prior appropriator.—*Id.*
5. **DISUSE OF WATER APPROPRIATED—FORFEITURE OF RIGHT—PERIOD OF DISUSE—CONSTRUCTION OF CODE.**—Section 1411 of the Civil Code, which declares that the appropriation of water must be for some useful or beneficial purpose, and that, when the appropriator, or his successor in interest, ceases to use it for such purpose, the right ceases, deals with the forfeiture of the right by nonuser alone as distinguished from abandonment; and, by analogy, this section must be construed as making a cessation of the use by the appropriator work a forfeiture of his right, where there is a failure to make any beneficial use of the water for a period of more than five years, and, in such case, a subsequent appropriator for a beneficial use acquires a right to the water.—*Id.*

See EASEMENT; NUISANCE.

## WILLS.

1. **INFORMAL EXECUTION—MISTAKE IN SIGNATURE OF WITNESS—REVOCATION OF PROBATE.**—Where a will, written by an attorney at law of the testator, was executed in the presence of the attorney and another person, who were requested by the testator to attest its execution as witnesses, and the attorney, in signing his name as a witness at the end of the will, inadvertently employed his own initials in connection with the testator's surname, and did not attach his own name to the will as a witness, the will is insufficiently executed, and the court may properly revoke its probate upon petition of an heir of the testator.—*Estate of Walker*, 387.
2. **LEGISLATIVE AUTHORITY—COMPLIANCE WITH LAW ESSENTIAL.**—The right to make a testamentary disposition of property is not an inherent right, nor a right granted by the constitution, but it rests wholly upon the legislative will, and is derived entirely from

## WILLS (Continued).

the statutes; and in conferring that right the legislature has seen fit to prescribe certain requirements in reference to the execution and authentication of the instrument, a compliance with which is necessary to the exercise of the right.—*Id.*

3. CONSTRUCTION OF STATUTE OF WILLS—INTENTION OF TESTATOR—LEGISLATIVE INTENT.—The rule governing the interpretation of wills, which recognizes and endeavors to carry out the intention of the testator, cannot be invoked in the construction of the statute regulating their execution, in respect to which the courts do not consider the intention of the testator, but only that of the legislature.—*Id.*
4. PROVINCE OF COURT—SUPREMACY OF LEGISLATIVE MANDATES—TECHNICALITIES.—It is not within the province of the courts to say that the statutory requirements in respect to the execution and authentication of wills, or any of them, are mere formalities, which may be waived without impairing the *status* of the instrument, or that a mode of execution or authentication, other than that prescribed by law, subserves the same purpose; but the legislative mandates are supreme, and although a failure to comply with them is of a nature purely technical, the court cannot dispense with technicalities imposed by the law-making power upon the maker of a will.—*Id.*
5. PECULIARITIES OF CALIFORNIA STATUTE—ENGLISH AUTHORITIES INAPPLICABLE.—The California statute differs from the English statute, in requiring a subscription of the name of the witness at the end of the will, and the English decisions as to what constitutes a signing under the English statute are inapplicable; and no other mode of subscription than that required by the California statute will answer the purpose in this state.—*Id.*
6. PROVING OF WILL—COMPLIANCE WITH LAW—WISHES OF TESTATOR.—In proving a will, the sole consideration before the court is whether or not the legislative mandates have been complied with, and the wishes of the testator cannot be considered.—*Id.*
7. PROBATE OF WILL—CONTEST—MENTAL CAPACITY OF TESTATOR—EVIDENCE OF ATTORNEY.—In a contest over the probate of a will where the question of the capacity of the testator in making the will is in issue, evidence of occurrences between the testator and the attorney who drew the will, and became a subscribing witness thereto, and the declarations and instructions of the testator are admissible and competent evidence upon the question of the testator's mental capacity at the time of the testamentary act.—*Estate of Mullin*, 252.
8. PRIVILEGED COMMUNICATIONS—WAIVER OF PRIVILEGE—CONSTRUCTION OF CODE—ATTORNEY AS WITNESS.—Section 1881 of the Code of Civil Procedure is designed to protect the interest of the client, whose privilege it is either to seal the lips of the attorney, or permit him to make disclosures of confidential communications, and where a testator has requested his attorney to become an attesting witness to his will, he thereby expressly waives the privilege.—*Id.*
9. PHYSICIAN AS WITNESS—WAIVER OF PRIVILEGE.—Where an attending physician and surgeon who attended the deceased during his last sickness was made a subscribing witness to the will, the testator thereby waived the privilege of confidential communications

**WILLS (Continued).**

to the physician accorded by subdivision 4 of section 1881 of the Code of Civil Procedure, and the witness is thereby rendered competent to testify as to the mental sanity and physical condition of the testator.—*Id.*

10. **CROSS-EXAMINATION OF PHYSICIAN.**—A physician testifying to the mental sanity of the testator at the time of the testamentary act may be cross-examined not only as to his qualifications, but also as to his knowledge of the character of the patient's afflictions, and as to all the facts or circumstances within his knowledge and acquaintanceship with the patient, upon which his judgment was exercised and his conclusion reached.—*Id.*
11. **LEGAL EXECUTION OF WILL—FINDING AGAINST EVIDENCE.**—Where the evidence without conflict shows a legal execution of the instrument probated as a will, provided the deceased had sufficient mental capacity and understanding to execute the will, a finding to the contrary cannot be sustained where it appears without conflict that he had sufficient mental capacity and understanding to make the will.—*Id.*

See **NEGLIGENCE, 8-14.**

**WITNESS.** See **EVIDENCE; WILLS, 7-11.**













## VOLUME CX.

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### 110 Cal. 1-7. WITTENBROCK v. CASS.

Constructive Trust held not to arise under facts stated, p. 8.

Distinguished in *Simons v. Bedell*, 122 Cal. 347, ruling aliter upon evidence, but see dissenting opinion, p. 351.

Delivery of Deed may be made to third person for benefit of grantees therein, p. 6.

To same effect in *Brown v. Westerfield*, 47 Neb. 407, 53 Am. St. Rep. 536, and *Arnegard v. Arnegard*, 7 N. Dak. 495, cited under *Bury v. Young*, 98 Cal. 446. Cited in *Kenney v. Parks*, 125 Cal. 151, noted under *Bury v. Young*, 98 Cal. 446; *Wilhoit v. Salmon*, 146 Cal. 446, where deed granted all interest of grantor in land together with rents, issues and profits thereof, grantees are entitled to grain rental as against grantor as life tenant; *Keyes v. Meyers*, 147 Cal. 706, where deed in favor of creditor of grantor was delivered in escrow under instructions that it was not to be delivered during life of either without consent of other, and after grantor's death it should be delivered to grantee, and it was later agreed that creditor should pay all grantor's expenses, provided that on payment of all debts grantor might demand deed, and it was delivered on death of grantor, no title passed.

### 110 Cal. 8-12. IN RE FIFE.

Habeas Corpus does not lie to review denial of jury trial in cases where jury may be waived, as it is mere error, p. 11.

Cited in *In re Walker*, 61 Neb. 811, as to want of jury trial where defendant was absent; *Wittman v. Police Court*, 145 Cal. 476, certiorari does not lie where police judge of San Francisco had jury in misdemeanor case summoned by sheriff.

### 110 Cal. 13-22. PAULY v. MURRAY.

Surety is Liable though signing after execution by principal, where former's signature was part of original agreement, p. 17.

Cited in *McDonald v. Randall*, 139 Cal. 256 (concurring opinion);

and *Stroud v. Thomas*, 139 Cal. 275, holding signature to relate back to time of original contract.

**110 Cal. 23-27. BOWMAN v. WHITE.**

Negligence is question of fact when evidence conflicting, p. 26.

To same effect in *Pacheco v. Judson etc. Co.*, 113 Cal. 545, holding nonsuit granted improperly.

**110 Cal. 27-33. HIBERNIA SAV. ETC. SOC. v. CLARKE.**

Mortgage Foreclosure.—Cross-complaint must be served on all the parties, p. 32.

Cited in *Houghton v. Tibbets*, 126 Cal. 61, and *Hibernia etc. Soc. v. London etc. Co.*, 138 Cal. 280, noted under *Hibernia etc. Soc. v. Fella*, 54 Cal. 598; *Stockton etc. Soc. v. Harrold*, 127 Cal. 619, on point that foreclosure cannot be granted on mere answer.

**110 Cal. 33-40. IN RE PATTON.**

Insolvency.—Petition by creditors held sufficient, p. 36.

Cited in *In re Mealy*, 127 Cal. 105, but holding petition insufficient as to alleged fraudulent transfer.

**110 Cal. 41-44. PEOPLE v. THOMAS.**

Prior Conviction.—Evidence of admissions of defendant as to prior conviction is inadmissible where he has pleaded guilty as to such conviction, p. 44.

Distinguished in *People v. Arnold*, 116 Cal. 687, permitting cross-examination of defendant as to such fact for purpose of impeachment.

Where Defendant Accused of Burglary and of prior conviction admits prior conviction, it is prejudicial to admit declarations of defendant as to imprisonment in state's prison, p. 44.

Distinguished in *People v. Smith*, 143 Cal. 601, remarks of district attorney, made in good faith in allusion to former conviction in argument to court on question of former jeopardy, are not prejudicial where court cautioned jury to ignore remarks.

**110 Cal. 45-53. COSBY v. SUPERIOR COURT; S. C. see KOFOED v. GORDON, 122 Cal. 322.**

Contempt is a specific criminal offense, p. 52.

Cited in *State v. District Court*, 24 Mont. 35, holding it a misdemeanor under local statutes.

Contempt.—Proceedings will not lie for disobedience of decree not entered, p. 52.

To same effect in *Ex parte Lake*, 37 Tex. Cr. Rep. 665, 66 Am. St. Rep. 855, discharging prisoner under facts stated.

**110 Cal. 54-59. WHITE v. SUPERIOR COURT.**

Certiorari will not lie from order directing receiver in divorce suit to sell property for payment of alimony decree, p. 57.

Cited in *Southern Cal. Ry. Co. v. Superior Court*, 127 Cal. 422, noted under *Gilman v. Contra Costa Co.*, 8 Cal. 52.

Prohibition Lies Only when there has been an Excess of jurisdiction and there is not plain, adequate and speedy remedy in ordinary course of law, p. 58.

Approved in *Valentine v. Police Court*, 141 Cal. 617, where conviction has been affirmed, prohibition does not lie to prevent issuance of bench warrant.

**110 Cal. 60-68. WHITE v. SUPERIOR COURT.**

On Certiorari, only Question is whether lower court has exceeded its jurisdiction, p. 64.

Approved in *Borchard v. Supervisors*, 144 Cal. 14, reviewing determination of supervisors that proper petition for organization of municipality had been presented and supported by required affidavit and that proper notice thereof had been published.

Courts.—Superior Court of San Francisco is but one, although divided into departments, p. 67.

To same effect in *Brown v. Campbell*, 110 Cal. 648, holding jurisdictions of respective departments to be identical.

**110 Cal. 69-78. FIRST NAT. BANK OF FRESNO v. DUSY.**

Amendment of Judgment for errors other than clerical cannot be had except by new trial or appeal, p. 76.

Cited in *O'Brien v. O'Brien*, 124 Cal. 426, noted under *Hayes v. Weatherbee*, 60 Cal. 396, and *Egan v. Egan*, 90 Cal. 21; *Canadian etc. Co. v. Clarita etc. Co.*, 140 Cal. 676, upholding amendment of judgment so as to conform to actual decision.

**110 Cal. 79-84. McGRATH v. CARROLL.**

Probate Claim must be presented for money demand, although arising from trust, p. 83.

To same effect in *Orcutt v. Gould*, 117 Cal. 316, as to demand for trust moneys commingled with general assets.

Probate Claim for money, based on trust, must set forth whole nature of transaction, p. 84.

Cited in *Faulkner v. Hendy*, 123 Cal. 470, holding claim insufficient; *Etchas v. Orena*, 127 Cal. 593, noted under *Aguirre v. Packard*, 14 Cal. 172; *Thompson v. Orena*, 134 Cal. 29, but holding claim sufficient; *Estate of Dutard*, 147 Cal. 257, 258, where claims were based solely on theory that specified property of decedent was trust property to which claimants were entitled as beneficiaries, without intimation of commingling of trust property with estate so that it could not be identified, but that claims presented asked for specified property or its value does not make claimants general creditors of estate.

#### 110 Cal. 85-89. **TERRY v. SUPERIOR COURT.**

**Appeal.**—Adverse Parties are such as so appear from record, p. 87.

To same effect in *Bullock v. Taylor*, 112 Cal. 150, dismissing appeal for nonservice of notice; *Johnson v. Phenix Ins. Co.*, 146 Cal. 575, in action on fire policy by owner of building against insurer and mortgagee, on appeal by insurer from judgment in favor of owner for full amount out of which mortgagee was to be paid, mortgagee must be served with notice of appeal.

#### 110 Cal. 94-101. **COUNTY OF SISKIYOU v. GAMLICH.**

**Highways.**—Proof of creation stated, p. 99.

To same effect in *Sonoma v. Crozier*, 118 Cal. 682, but holding complaint insufficient as not showing substantial compliance with statutes. Cited in *County of Sutter v. McGriff*, 130 Cal. 126, holding burden on defendant to prove nonqualification by viewers, when plaintiff has established prima facie case; *Sutter County v. Tisdale*, 136 Cal. 476, holding prima facie showing sufficient.

**Highways.**—Location is judicial act within determination of board, which is conclusive on collateral attack, p. 100.

Cited in *County of San Mateo v. Coburn*, 130 Cal. 635, noted under *Wulzen v. Board*, 101 Cal. 15; *Pool v. Simmons*, 134 Cal. 625, noted under *Tehama Co. v. Bryan*, 68 Cal. 63; *Sutter County v. Tisdale*, 136 Cal. 478, noted under *Humboldt County v. Dinsmore*, 75 Cal. 604; cited in *Santa Rosa v. Water Co.*, 138 Cal. 581, as instance when condemnation proceeding is styled an "action"; *Glide v. Superior Court*, 147 Cal. 26, prohibition lies to prevent superior court from proceeding with trial of suit to enjoin supervisors from acting on petition to organize reclamation district.

**Amendment of Answer** is within discretion of court, p. 101.

To same effect in *Bank v. Heron*, 122 Cal. 110, sustaining denial of application when issues would be changed thereby.

#### 110 Cal. 107-117. **BOYCE v. FISK.**

Interest may be charged at any rate agreed upon in writing, p. 112.



To same effect in *Yndart v. Den*, 116 Cal. 542, 58 Am. St. Rep. 206, but denying power to agree for compounding of interest beyond original rate.

**Probate Claim.**—Bar by limitation or statute of nonclaim cannot be waived by administrator, p. 117.

Cited in *Reay v. Heazelton*, 128 Cal. 339, as to claim barred by limitation.

Equity will not Interfere with Contract merely because bargain is a very hard or unreasonable one, p. 116.

Approved in *Pacific States Sav. etc. Co. v. Green*, 123 Fed. 46, contract between building and loan association and borrowing stockholder not unconscionable because it requires stockholder to carry and mature stock of par value of double amount of loan, paying interest on loan, one-half of which stock is assigned absolutely to association as bonus.

110 Cal. 122-128. **SMITH v. HAWKINS**; S. C. 120 Cal. at 87.

**Appropriation of Water** becomes a servitude on the land, p. 125.

To same effect in *Dixon v. Schermeier*, 110 Cal. 585, holding servitude extinguished by joinder of ownership of land and ditch.

**Water Rights** appropriated on public lands operate as an easement as against subsequent patentee, p. 125.

Cited in *Senior v. Anderson*, 130 Cal. 296, but held not to allow right to divert water and hold against subsequent appropriator, without devoting it to beneficial use; *Oliver v. Agasse*, 132 Cal. 300, but denying right of appropriator to change mode of enjoyment of such easement as against the patentee; *Tuolumne etc. Co. v. Maier*, 134 Cal. 586, holding mining rights subject to such easement under facts stated.

**Water Right is Abandoned** by continuous nonuser for five years, p. 127.

To same effect in *Integral etc. Co. v. Altoona etc. Co.*, 75 Fed. Rep. 381, 382, discussing conflict with 106 Cal. 392. Approved in *Montecito Valley Co. v. Santa Barbara*, 144 Cal. 597, averment that user, in place of prescriptive right to water, was peaceful, includes averment that it was peaceable.

110 Cal. 128-129. **TRUMAN v. BOARD OF SUPERVISORS**.

**Municipal Ordinance** fixing tax rate is not subject to mayor's approval, p. 129.

To same effect in *Morton v. Broderick*, 118 Cal. 486, as rule before Stats. 1897, p. 190, but holding that act inapplicable to San Francisco. Cited in *Popper v. Broderick*, 123 Cal. 460, quoting *Morton v. Broderick*, 118 Cal. 474; *Harrison v. Roberts*, 145 Cal. 180, proposed amendment

to San Francisco charter proposed by supervisors need not be presented to mayor for approval.

**110 Cal. 129-145. FISCHER v. SUPERIOR COURT; S. C. see LOFTUS v. FISCHER, 117 Cal. 130.**

**Corporation.**—Receiver will not be appointed to take possession of property of pending suit, p. 141.

Cited in *Murray v. Superior Court*, 129 Cal. 633, noted under *Neall v. Hill*, 16 Cal. 150; note to *Cameron v. Groveland etc. Assn.*, 72 Am. St. Rep. 35, 37, 50.

**Receivers of Corporations.**—Prohibition will lie where appointment unauthorized, p. 144.

To same effect in *St. Louis etc. Co. v. Wear*, 135 Mo. 258, discussing validity of appointment, under local statutes.

**110 Cal. 150-155. GREGORY v. SPIEKER; 52 Am. St. Rep. 70.**

**Damages—Sale of Goodwill.**—On breach of contract not to reengage in business, plaintiff (buyer) cannot recover gain to seller, p. 155.

Cited in *Doe v. Tooez*, 37 Or. 20, stating elements of damage on such action.

**110 Cal. 155-163. PEOPLE v. JAMES.**

**Idem Sonans.**—Principle applies as to name of person in alleged forged instrument, p. 158.

Cited in *Donahoe etc. Co. v. S. P. Co.*, 138 Cal. 193, noted under *People v. Fick*, 89 Cal. 144.

**110 Cal. 164-168. FERNANDEZ v. BURLESON; 52 Am. St. Rep. 75.**

**Mechanics' Liens.**—Notice is insufficient that does not describe premises with reasonable certainty, p. 166.

See notes to *Wharton v. Investment Co.*, 57 Am. St. Rep. 633, and *Morrison v. Willard*, 70 Am. St. Rep. 788.

**110 Cal. 169-173. DAGGETT v. GRAY.**

**Pleading.**—Defect in complaint may be cured by allegations of answer, even though demurrer erroneously overruled, p. 172.

To same effect in *Kreling v. Kreling*, 118 Cal. 420, as to allegations regarding appointment of executrix. Cited in *Flinn v. Ferry*, 127 Cal. 654, holding defendant estopped from denying that his answer did not raise a certain issue; *Heid v. Tuohy*, 133 Cal. 61, holding defect cured by answer; *Antonelle v. Lumber Co.*, 140 Cal. 321, following rule; *Abner Doble Co. v. Keystone etc. Co.*, 145 Cal. 496, applying rule in action on note.

**Conversion.**—Complaint held sufficient as against general demurrer, p. 171.

Cited in *Lowe v. Ozmun*, 137 Cal. 260, sustaining similar complaint.

Where Relation of Defendant to Property is such that demand is necessary to establish conversion, demand must be proved but need not be alleged, p. 171.

Approved in *Stevens v. Curran*, 28 Mont. 372, in action for conversion by sheriff who seized under mortgage, no demand necessary to entitle plaintiff to sue.

**110 Cal. 173-179. BROOKS v. SAN FRANCISCO ETC. RY. CO.**

Order granting new trial on ground of insufficiency of evidence is discretionary, p. 175.

Approved in *Von Schroeder v. Spreckels*, 147 Cal. 187, upholding grant of new trial in libel suit.

Dismissal of Appeal from judgment will be granted when compliance with condition granting new trial will cause judgment to cease to exist, p. 179.

To same effect in *Pierce v. Birkholm*, 110 Cal. 672, on point that appeal from order granting new trial sets judgment at large.

**New Trial.**—Court may impose terms on granting motion, p. 176.

Cited in *Anglo Nev. etc. Corp. v. Ross*, 123 Cal. 521, as to order imposing costs on granting plaintiff's motion, when objection is raised on appeal by defendant.

**110 Cal. 179-182. GRUNSKY v. PARLIN.**

**Fraudulent Conveyance.**—Presumption of fraud from transfer out of usual course may be rebutted, p. 182.

To same effect in *Matthews v. Chaboya*, 111 Cal. 438, sustaining finding of innocence on conflicting evidence.

**110 Cal. 183-190. KNOWLTON v. MACKENZIE.**

**Appeal.**—Proof of Service of notice may be filed on motion to dismiss, where not appearing in transcript, p. 189.

To same effect in *Warren v. Hopkins*, 110 Cal. 510, denying motion and construing rule 15 of supreme court. Cited in *Sutter Co. v. Tisdale*, 128 Cal. 181, noted under *Heinlen v. Heilbron*, 94 Cal. 636; *Bell v. Staacke*, 137 Cal. 308, on point that appeal will not be dismissed for matters occurring before order appealed from.

**Appeal—Service of Notice.**—Trial court may allow copy of proof to be filed nunc pro tunc when original lost, p. 189.

To same effect in *Hibernia etc. Society v. Matthai*, 116 Cal. 426, as to like filing in case of service of summons.

Miscellaneous.—*Hibernia Sav. etc. Soc. v. Kaufman*, 140 Cal. 70, 71, 72, reciting facts of litigation.

110 Cal. 198-203. **ROSENTHAL v. MERCED BANK.**

Homestead is not creatable out of land held in common, p. 202.

To same effect in *In re Still*, 117 Cal. 515, but holding rights of widow in community property not a tenancy in common under this rule.

Answer.—Genuineness and due execution of instrument set forth in, are admitted by plaintiff's failure to file reply affidavit, p. 203.

To same effect in *Moore v. Copp*, 119 Cal. 432, but holding rule not to extend to attack for fraud, although no replication filed. Cited in *Knight v. Whitmore*, 125 Cal. 201, on point that such instrument need not then be offered in evidence.

110 Cal. 204-214. **KUMLE v. GRAND LODGE.**

Specification of Insufficiency of evidence is insufficient when stating merely what evidence established, p. 213.

To same effect in *Haight v. Tryon*, 112 Cal. 7, and *De Molera v. Martin* 120 Cal. 548, cited under *Dawson v. Schloss*, 93 Cal. 194. Cited in *Taylor v. Bell*, 128 Cal. 308, noted under *Spotts v. Hanley*, 85 Cal. 155; *Drathman v. Cohen*, 139 Cal. 313, noted under *Baird v. Peall*, 92 Cal. 238; *Cain v. Gold Mt. Min. Co.*, 27 Mont. 534, following rule.

Mutual Benefit Society.—Rules cannot adjudge forfeiture of property rights, p. 212.

Cited in *Grimbley v. Harrold*, 125 Cal. 31, 73 Am. St. Rep. 24, holding rights of beneficiary not concluded by decision of board of arbitration in whose selection she had no voice; *Doggett v. United Order*, 126 N. C. 480, holding prima facie case established by beneficiary under facts stated. See note, 59 Am. St. Rep. 204.

In Action on Life Insurance Policy burden of establishing failure to pay assessments is upon defendant, p. 209.

Approved in *Thomas v. Northwestern etc. Ins. Co.*, 142 Cal. 83, 86, 88, in action on life policy by beneficiary to whom it was payable in case of death of insured during continuance of policy, where payment of first premium is admitted, burden is not on plaintiff to show payment of subsequent premiums.

General Citation.—*Grand Lodge A. O. U. W. v. Furman*, 6 Okla. 669.

110 Cal. 215-218. **WULFF v. SUPERIOR COURT;** 52 Am. St. Rep. 78.

110 Cal. 226-236. **IN RE BLYTHE.** S. C. 110 Cal. 230; 123 Cal. 170; **BLYTHE CO. v. BANKER'S INVESTMENT CO.** 147 Cal. 84.

**Probate Law.**—Heirship Proceedings under code are not a civil action, p. 228.

To same effect in *Estate of Joseph*, 118 Cal. 663, holding proceedings to revoke probate to be of similar character, as to provision requiring security for costs. Approved in *Estate of Sutro*, 143 Cal. 492, fact that, in proceedings to establish heirship, complaint was filed more than twenty days after decree establishing proof of service of notice, cannot justify dismissal of proceedings for want of jurisdiction.

**Appeal.**—Probate Decree in heirship proceedings is entered when spread at length on minute book, p. 228.

To same effect in *Estate of Shield*, 122 Cal. 529, holding appeal premature. Cited in *In re Clarke*, 125 Cal. 394, applying rule to adjudication in insolvency.

110 Cal. 236-242. **YORE v. BOOTH;** 52 Am. St. Rep. 81.

**Life Insurance.**—Declarations of deceased as to age are not binding on beneficiaries, unless made at time of application for policy, p. 241.

Cited in *Jenkin v. Pac. etc. Co.*, 131 Cal. 123, noted under *Griffith v. New York etc. Co.*, 101 Cal. 627.

**Life Insurance.**—Beneficiary cannot be changed unless policy so provides, although insured pays premiums himself and retains policy, p. 241.

Approved in *Stockwell v. Mutual Life Ins. Co.*, 140 Cal. 201, beneficiary paying premiums acquires equitable lien upon proceeds of policy for reimbursement of money advanced for benefit of other beneficiaries who claim an interest in such proceeds. Explained and distinguished in *Estate of Miller*, 121 Cal. 355, discussing devolution of receipts from policy made payable to administratrix.

**General Citation.**—*Hendrie etc. Mfg. Co. v. Platt*, 13 Colo. App. 20.

110 Cal. 243-246. **GIBSON v. WHEELER.**

**Mechanics' Liens.**—Recovery is limited by amount due contractor by owner, p. 243.

To same effect in *Denison v. Burrell*, 119 Cal. 183, where building completed by owner after abandonment.

110 Cal. 252-259. **IN RE MULLIN.**

**Privileged Communications.**—Physician may testify as to testator's condition on execution of will when made a subscribing witness, p. 255.

See note on general subject to *O'Brien v. Spalding*, 66 Am. St. Rep. 231.

**110 Cal. 259-266. GRISWOLD v. PIARATT.**

Counterclaim for less than three hundred dollars is not within the jurisdiction of superior court, except when sought as a setoff, p. 265.

Cited and distinguished in *Freeman v. Seitz*, 126 Cal. 294, as to counter claim asserted under subdivision 1, section 438, Code of Civil Procedure; *Sullivan v. Cal. Realty Co.*, 142 Cal. 208, where plaintiff sues to cancel contract, judgment may be awarded for defendant under cross-complaint for amount of first installment due contractor, though amount thereof is less than three hundred dollars.

**110 Cal. 267-277. IN RE BEISEL.**

Mother is chargeable equity in as quasi guardian, and accounting must be conducted on equitable principles, p. 275.

To same effect in dissenting opinion in *Estate of Kincaid*, 120 Cal. 211-213, main opinion denying right of probate court to review advances by guardian after ward's majority. Approved in *Wilson's Guardianship*, 40 Or. 357, guardian allowed credit for expenditures incurred for support of ward without authority of court if they are such as court would originally have authorized.

**110 Cal. 277-292. REDFIELD v. OAKLAND ETC. RY. CO.**

In Action for Damages for Death of Wife and Mother verdict for fourteen thousand dollars is not excessive where it cannot be said jury acted from passion or prejudice, pp. 285-287.

Approved in *Skelton v. Pac. Lumber Co.*, 140 Cal. 512, upholding verdict for eighteen thousand dollars for death of servant in action by his wife and children.

**110 Cal. 292-297. CASTRO v. GEIL; 52 Am. St. Rep. 84.**

Insanity.—Deed of person of unsound mind is not void unless he is entirely without understanding, p. 296.

Cited in *Jacks v. Estee*, 139 Cal. 512, noted under *Harris v. Harris*, 59 Cal. 621; note to *Flach v. Gottschalk Co.*, 71 Am. St. Rep. 431.

An Action to Set Aside Deed for fraud is barred in three years under Code of Civil Procedure, section 318, subdivision 4, p. 295.

Distinguished in *Murphy v. Crowley*, 140 Cal. 147, 148, action by heir to set aside conveyance for fraud practiced on deceased by defendant and to enforce trust as to another tract, is action to recover realty and barred in five years under Code of Civil Procedure, section 318.

In Action to Set Aside Deed for Fraud, when acts constituting fraud occurred more than three years before commencement of action, plaintiff must allege discovery thereof within three years, p. 295.

Approved in *Murphy v. Crowley*, 140 Cal. 152, action by heir to set aside conveyance for fraud practiced on deceased by defendant and to enforce trust is action to recover realty and barred in five years under Code of Civil Procedure, section 318.

General Citation.—*French Lumbering Co. v. Thierault*, 107 Wis. 642.

**110 Cal. 297-311. LEVY v. MAGNOLIA LODGE.**

**Mutual Benefit Society.**—Remedy provided by by-laws must be exhausted before recourse to courts is permissible, p. 307.

To same effect in *Robinson v. Lodge*, 117 Cal. 374, 376, 59 Am. St. Rep. 196, 197 (and note, 204, 206), as to by-law prescribing arbitration in case of claim for by-laws; *Conway v. Supreme Council*, 131 Cal. 439, on point that method of change of beneficiary is subject to by-laws of order; note to *Kearns v. Hawley*, 68 Am. St. Rep. 870; *Pool v. Brotherhood etc.*, 143 Cal. 653, granting non suit where approval of beneficiary board was condition precedent to claim for benefits and board had rejected claim; *Schou v. Sotoyome Tribe*, 140 Cal. 257, where sick benefits were sought on behalf of insane member by wife as his guardian, and order violated own laws in not giving notice or opportunity to produce testimony, court has jurisdiction to hear controversy; *Albers v. Merchants' Exchange*, 188 Mo. 164, on point that societies constitute corporate court when acting upon charges within their charter power.

**110 Cal. 311-318. EASTERBROOK v. FARQUHARSON.**

Interest is not allowable on unliquidated demand, p. 317.

To same effect in *Ferrea v. Chabot*, 121 Cal. 237, holding interest not recoverable for breach of covenant discussed. Cited in *Macomber v. Bigelow*, 126 Cal. 15, noted under *Cox v. McLaughlin*, 76 Cal. 60; *Stimson v. Dunham etc. Co.*, 146 Cal. 285, refusing interest on foreclosure of mechanic's lien where notices of laborers served on owner.

**110 Cal. 318-320. MULLER v. ROWELL.**

Findings are Unnecessary where agreed statement of facts filed, p. 319.

To same effect in *Denison v. Burrell*, 119 Cal. 181, when such stipulation made part of judgment-roll. Cited in *Conway v. Supreme Council*, 137 Cal. 386, holding such stipulation of counsel equivalent to findings.

**110 Cal. 320-331. BAILEY v. MARKET STREET ETC. CO.**

**Street Railway.**—Contributory Negligence is shown by stepping upon track without due caution. p. 328.

To same effect in *Everett v. Railway Co.*, 115 Cal. 125, reversing judgment for plaintiff under facts stated. Cited in *Clark v. Bennett*, 123 Cal.

277, but holding contributory negligence, under facts stated, not established as matter of law, citing main case also at page 279, as to relative rights of wayfarer and street railroad; *Green v. Los Angeles etc. Ry.*, 143 Cal. 37, following rule. Dissenting opinion in *Cincinnati etc. Co. v. Snell*, 54 Ohio St. 211, holding same rules to apply to street and steam railway.

**110 Cal. 332-335. WICKERSHAM v. CRITTENDEN.**

Corporation—Directors.—Fixing of salary of president is invalid when his vote was necessary for passage of resolution, p. 334.

Cited in *Lower etc. Reclamation Dist. v. McCullah*, 124 Cal. 183, but sustaining sale to reclamation district by its trustee, where contract was fair and his vote was not necessary.

**110 Cal. 335-338. RYAN v. HOLLIDAY.**

Foreclosure.—Nonpayment of note must be specifically alleged, p. 337.

To same effect in *Richards v. Land Co.*, 115 Cal. 643, holding complaint insufficient hereon; and *Hurley v. Ryan*, 119 Cal. 72, and *Dodge v. Kimple*, 121 Cal. 581, ruling similarly. Cited in *Schwind v. Hall*, 129 Cal. 43, but sustaining complaint as against demurrer; *Penrose v. Winter*, 135 Cal. 290, 291, 293 (where overruled in part), and *Knox v. Buckman etc. Co.*, 139 Cal. 599, noted under *Frisch v. Caler*, 21 Cal. 71; *Knox* case holding main case overruled in *Penrose* case only as to phase of default judgment.

**110 Cal. 339-347. BUCKLEY v. GRAY; 52 Am. St. Rep. 68.**

Contract.—Action for breach cannot be brought by one not in privity with either contracting party, p. 342.

Cited in *Brown v. Sims*, 22 Ind. App. 324, 72 Am. St. Rep. 313, but holding searcher liable to person who informed him he should rely on the abstract in making loan; *Currey v. Butcher*, 37 Or. 389, holding husband's attorneys not liable to wife when ignorant of his agency for her; note to *Baxter v. Camp*, 71 Am. St. Rep. 182, 193; *Washer v. Independent M. etc. Co.*, 142 Cal. 708, where mine owner agreed with third party that he should make advances for development in consideration of interest in mines, and agreement that in case of sale all advances should be paid for in cash, third party may recover advances of one purchasing subject to contract.

**110 Cal. 348-361. CAVALLARO v. TEXAS ETC. RY. CO.; 52 Am. St. Rep. 94.**

Exceptions to Instructions may be general as to special instructions asked by the parties, p. 358.



Cited in *Williams v. Casebeer*, 126 Cal. 86, as to instructions given at adversary's request.

Law of Foreign State, even if statutory, is presumed to be same as our own, p. 357.

Cited in *Woolacott v. Case*, 63 Kan. 36, as to statutes respecting sale of intoxicating liquors; *Gunderson v. Gunderson*, 25 Wash. 463, noted under *Hill v. Grigsby*, 32 Cal. 56. See note, 56 Am. St. Rep. 474.

Common Carriers—Delivery.—Liability as to, stated, p. 355.

See note to *Barry v. Railroad Co.*, 67 Am. St. Rep. 788.

110 Cal. 361. *RAUER v. FAY*. See S. C., 128 Cal. 524.

110 Cal. 369-374. *PEOPLE v. WARD*.

Bribery.—Indictment must state specific facts constituting statutory offense, p. 373.

To same effect in *State v. Howard*, 66 Minn. 313, 61 Am. St. Rep. 407, holding indictment insufficient when merely following language of statute. Cited in *People v. Webber*, 138 Cal. 149, as to information for burglary; *People v. Mahoney*, 145 Cal. 106, 107, indictment for presentation of fraudulent claim against county under Penal Code section 72, merely following language of statute, is insufficient; *Banks v. State*, 157 Ind. 197, as to information for bribery of public officer.

110 Cal. 374. *BANCROFT v. BANCROFT*.

Undue Influence.—Rescission and offer to restore is necessary, as to sale procured by, p. 379.

Distinguished in *Westerfeld v. New York etc. Co.*, 129 Cal. 81, discussing right to bring action for damages for fraud in settlement without offer to restore.

110 Cal. 387-400. *IN RE WALKER*; 52 Am. St. Rep. 104.

Will.—“Signing” does not necessitate subscription, p. 393.

To same effect in *In re Stratton*, 112 Cal. 519, as to olographic will not required by statute to be subscribed; *California etc. Co. v. Scatena*, 117 Cal. 450, holding memorandum under statute of frauds sufficiently subscribed when name written across face; *Estate of Seaman*, 146 Cal. 460, 461, will written on four page blank having unfilled attestation clause on third page, fourth page being merely for blank indorsements when folded and which was signed beneath scrivener's title and blank form for date and filing, with testator's name, was not signed “at end thereof” as required by law.

Will.—Attestation Clause is invalid where not conforming to statute, p. 391.

Cited in *McCarn v. Rundall*, 111 Iowa, 408, holding attestation insufficient. Notes Cal. Rep.—294.

cient under local statutes; note to *In re Andrews*, 76 Am. St. Rep. 301. Distinguished and held inapplicable in *Estate of Tyler*, 121 Cal. 413, holding attestation clause sufficient, although name of subscribing witness omitted from body thereof.

110 Cal. 401-404. **BOYER v. SUPERIOR COURT.**

**Appeal.**—Justification of Sureties on bond cannot be ordered before judge, when already had before clerk, p. 403.

To same effect in *Kreling v. Kreling*, 116 Cal. 461, holding decision of clerk conclusive. Approved in *Burns v. Superior Court*, 140 Cal. 12, superior court in which action pending has jurisdiction on proper showing by affidavit to punish as contempt disobedience of witness to notary's subpoena requiring attendance, to give deposition to be used in action.

110 Cal. 408-413. **IN RE CONNORS.**

**Letters of Administration.**—Public Administrator contested right of father of deceased to, p. 410.

Cited in *Estate of Healy*, 122 Cal. 163, in support of his power so to contest.

110 Cal. 418-422. **BARNES v. BARNES.** Cited in *Mets v. Blackburn*, 9 Wyo. 512.

110 Cal. 423-428. **PREY v. STANLEY.**

**Parties.**—Wife may sue to quiet title to her separate property, although homestead declared, p. 425.

To same effect in *California etc. Co. v. Anderson*, 79 Fed. Rep. 406, holding void her mortgage of homestead to secure husband's antecedent debts. Cited in *Hart v. Church*, 126 Cal. 481, 77 Am. St. Rep. 205, as to suit to cancel, for fraud, her mortgage of her homestead interest.

110 Cal. 428-433. **GILETTI v. SARACCO.**

**Findings** are unnecessary when no evidence is introduced to support allegations, p. 430.

Cited in *Klokke v. Escailler*, 124 Cal. 300, noted under *Wise v. Burton*, 73 Cal. 175; *De Tolna v. De Tolna*, 135 Cal. 578, noted under *Himmelman v. Henry*, 84 Cal. 105; *Callahan v. James*, 141 Cal. 294, failure to find on issue of forfeiture in action to quiet title to mining claim will not justify where there is no evidence to sustain such defense.

110 Cal. 433-440. **CURTISS v. BACHMAN;** 52 Am. St. Rep. 111.

**Injunction Bond.**—Counsel Fees are not recoverable for services in resisting order to show cause, p. 437.

To same effect in *Alaska etc. Co. v. Hirsch*, 119 Cal. 260, disallowing such fees. Cited in *Black v. Hilliker*, 130 Cal. 194, noted under *Mitchell v. Hawley*, 79 Cal. 301; *Frahm v. Walton*, 130 Cal. 400, but allowing fees in case of voluntary dismissal of action pending motion to dissolve injunction; note to *Hyatt v. Washington*, 67 Am. St. Rep. 250.

**110 Cal. 441. RICHARDSON v. EUREKA.**

Instructions to Jury will not be reviewed when verdict was merely advisory, p. 446.

Cited in *Scheerer v. Goodwin*, 125 Cal. 159, as to action for injunction against execution of writ of restitution; *Fisher v. Zumwalt*, 128 Cal. 500, and *Haggin v. Saile*, 23 Mont. 382, noted under *Sweetsar v. Dobbins*, 65 Cal. 529; *California Electric Light Co. v. California Safe Deposit Co.* 145 Cal. 133, applying rule to admission of evidence in action by corporation against executors of deceased manager to recover secret commissions received by him on sale of its property.

Suit to Enjoin Nuisance is in equity, p. 446.

Approved in *McCarthy v. Gaston Ridge Mill etc. Co.*, 144 Cal. 546, reaffirming rule.

**110 Cal. 455-457. BAKER v. SOUTHERN CAL. RY. CO. S. C. 114 Cal. 505, 126 Cal. 517.**

Appeal Lies from judgment of superior court in action certified from justice's court because involving ownership of realty, p. 456.

Cited in *Southern Cal. Ry. Co. v. Superior Court*, 127 Cal. 421, as to appeal from orders made after judgment in main case.

Under Civil Code, Section 485, plaintiff must be the owner of the land through which road passes, p. 456.

Distinguished in *Walther v. Sierra Ry.*, 141 Cal. 289, tenant may, under Civil Code, section 486, sue railroad for killing animal along track.

**110 Cal. 457-462. WILLIAMS v. SOUTHERN PACIFIC RD. CO.**

Nonjoinder of Partner as plaintiff is waived if not raised by pleadings, p. 460.

To same effect in *Ah Tong v. Fruit Co.*, 112 Cal. 682.

Appeal—Instructions.—Conflict with other instructions is immaterial as to erroneous instruction given at appellant's request, p. 462.

Cited in *Wall v. Marshutz*, 138 Cal. 526, noted under *Dennison v. Chapman*, 105 Cal. 447; *Clisby v. Mobile etc. Co.*, 78 Miss. 949, on point that appellant cannot complain of instructions given at his request; *Blair v. City of Groton*, 13 S. Dak. 216, as to conflicting instructions, when jury was not misled.

110 Cal. 463. **MEHERIN v. SANDERS.** S. C. 131 Cal. 686. Cited in *Clisby v. Mobile etc. Ry. Co.* 78 Miss. 949.

110 Cal. 467-471. **FREESE v. PENNIE.**

**Probate Law.**—Attorneys' Fees are within discretion of court, p. 470.

Cited in *Estate of Adams*, 131 Cal. 419, holding no abuse shown; *Treadwell v. Treadwell*, 134 Cal. 158, applying rule to allowance to referees in partition suit; *Estate of Straus*, 144 Cal. 558, following rule.

**Probate Law.**—Attorneys' Fees should not be too liberally allowed, p. 471 (concurring opinion).

To same effect in *Estate of Byrne*, 122 Cal. 266, holding allowance not too small.

110 Cal. 471-480. **MAHONEY v. SAN FRANCISCO ETC. RY. CO.**

**Street Railroad.**—Contributory negligence is not shown as matter of law by fact of driving near track at night, p. 475.

Cited in *Mertz v. Detroit, etc. Co.*, 125 Mich. 15, holding question one for jury where wagon was struck by car going in same direction.

**Death by Negligence.**—Evidence is inadmissible of poverty of children of deceased, p. 476.

To same effect in *Green v. S. P. Co.*, 122 Cal. 565, holding its admission reversible error. Distinguished in *Dyas v. Southern Pac. Co.*, 140 Cal. 308, upholding instruction in negligence case that deceased was sole support of plaintiffs, where admission was expressly made by pleadings and no objection made below.

**Misconduct of Judge** is ground for reversal, when prejudicial to appellant, p. 476.

To same effect in *German etc. Bank v. Bank*, 101 Iowa, 548, 63 Am. St. Rep. 410, but holding acts stated not to amount to coercion to bring in certain verdict.

**General Citation.**—*La Pontney v. Shedden Cartage Co.*, 116 Mich. 515.

110 Cal. 480-487. **McKUNE v. SANTA CLARA ETC. CO.**

**Contributory Negligence** is question of fact, when judge believes that reasonable men might differ as to effect of evidence, p. 484.

To same effect in *Herbert v. S. P. Co.*, 121 Cal. 229, holding such negligence shown under facts stated. Cited in *Liverpool etc. Co. v. S. P. Co.*, 125 Cal. 440, as to permitting engine without spark-arresters on premises; *Wahlgren v. Market St. Ry. Co.*, 132 Cal. 664, quoting *Herbert v. S. P. Co.*, 121 Cal. 229; *Seller v. Market St. Ry. Co.*, 139 Cal. 271, as to riding on platform of electric car.

**110 Cal. 488-490. IN RE RAMAZZINA.**

Insolvency is the inability to pay one's debts from his own means as they mature, p. 489.

To same effect in *In re Chope*, 112 Cal. 633, holding showing in schedule "not necessarily inconsistent with a state of insolvency."

**110 Cal. 490-493. BAILEY LOAN CO. v. HALL.**

Default Judgment cannot exceed relief prayed for in complaint, p. 492.

Cited in *Staacke v. Bell*, 125 Cal. 313, noted under *Mudge v. Steinhart*, 78 Cal. 34.

Parties.—Judgment in action on joint contract may be given against such defendants alone as are shown to be liable, p. 492.

Cited in *Dobbs v. Purington*, 136 Cal. 71, noted under *Rowe v. Chandler*, 1 Cal. 167.

**110 Cal. 494-502. IN RE CLOS.**

Executor's Accounts are to be settled according to rules and principles of equity, p. 501.

To same effect in *In re Clary*, 112 Cal. 294, and *Estate of Kincaid*, 120 Cal. 211, 213, cited under *In re Moore*, 96 Cal. 528; *Estate of Carpenter*, 146 Cal. 665, allowing interest to administrator where he necessarily advanced money to estate for its benefit.

**110 Cal. 502-506. KIRSCHNER v. DIETRICH.**

Death.—Divorce suit is abated by, p. 504.

Cited in *Estate of Bachelder*, 123 Cal. 567, applying rule to death of widow pending her appeal from order denying family allowance; *Smith v. Smith*, 124 Cal. 653, and *Nickerson v. Nickerson*, 34 Or. 3, as to appeals in divorce suits; *Begbie v. Begbie*, 128 Cal. 155, appeal from order denying new trial in divorce abates on appellant's death.

**110 Cal. 506-512. WARREN v. HOPKINS.**

Dismissal of Appeal for defects in transcript will be denied, when these are remedied at hearing of motion, p. 509.

To same effect in *In re Ryer*, 110 Cal. 560, as to want of proper authentication of transcript; *Shay v. Clock Co.*, 111 Cal. 552, as to absence of certificate of clerk regarding sufficiency of undertaking. Cited in *Swortfiguer v. White*, 137 Cal. 392, as to improper authentication of transcript.

Appeal.—Uncertainty in Findings will be construed in support of judgment, p. 512.

Cited in *Krasky v. Wollpert*, 134 Cal. 342, and *De Haven v. Berendes*, 135 Cal. 180, noted under *Breeze v. Brooks*, 97 Cal. 77.

110 Cal. 513-523. **HOWLAND v. OAKLAND ETC. RY. CO.** S. C. see 115 Cal. 496.

**Appeal.**—General Objection to expert evidence is not reviewable, p. 520.

To same effect in *People v. Hickman*, 113 Cal. 88, as to such objection to question regarding general reputation of witness; *Howland v. Railway Co.*, 115 Cal. 495, as to objection to expert evidence; *Davey v. S. P. Co.*, 116 Cal. 331, but holding rule confined to cases where party is seeking to reverse judgment; *Frank v. Pennie*, 117 Cal. 256, on point that party will be restricted on appeal to objection taken at trial.

**Negligence.**—Expert Evidence is admissible as to manner of running electric cars, p. 522.

To same effect in *Wright v. S. P. Co.*, 15 Utah, 425, admitting such evidence as to proper management of locomotive.

110 Cal. 530-537. **RICHTER v. HENNINGSAN.** S. C. see **WOLTERS v. HENNINGSAN**, 114 Cal. 434.

**Contribution.**—Statute of Limitations begins to run from payment by plaintiff, p. 537.

Cited in *Bunker v. Osborn*, 132 Cal. 483, holding action not barred; *Northwestern Nat. Bank v. Opera House Co.*, 23 Mont. 7, noted under *Chipman v. Morrill*, 20 Cal. 131.

110 Cal. 538-542. **CALIFORNIA STATE BANK v. WEBBER.**

**Mortgage Tax.**—Verbal Agreement that if mortgagor pays mortgage tax he shall be allowed reduction on stipulated interest does not violate constitutional provision, p. 542.

Cited in *Matthews v. Ormerd*, 134 Cal. 86, 87, noted under *Hewitt v. Dean*, 91 Cal. 10.

110 Cal. 543-547. **SCHWIESAU v. MAHON.**

**Street Assessments.**—Proceedings are in invitum, and must follow statute strictly, p. 546.

Cited in *Gill v. City of Oakland*, 124 Cal. 340, holding notice to owners of hearing of appeal insufficient.

**Same.**—Contract is invalid where specifications are not annexed, p. 546.

Cited in *Gray v. Richardson*, 124 Cal. 461, declaring to compel issuance of assessment thereunder.

110 Cal. 547-553. **NORTHEY v. BANKERS' LIFE ASSN.**

**Life Insurance.**—Assessment may be paid during succeeding day, when day for payment falls on holiday, p. 552.

See note to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 573, on payment.

**110 Cal. 553-555. ARBIOS v. COUNTY OF SAN BERNARDINO.**

Claim Against County allowed in part must be again presented as to balance, p. 554.

Distinguished in *San Diego v. Riverside*, 125 Cal. 499, as to claim totally rejected on first presentation.

**110 Cal. 556-562. IN RE RYER.**

Dismissal of Appeal cannot be granted because of reasons sufficient for denial of new trial or settlement of statement, p. 559.

To same effect in *McMahon v. Thomas*, 114 Cal. 590, stating proper practice in such event; *Johnson v. Phenix Ins. Co.* 146 Cal. 573, where notice of appeal from order denying new trial is served on parties to motion below, appeal will not be dismissed for failure to serve defendant interested in judgment who was not party to judgment.

Dismissal of Appeal will not be granted for matters occurring before the order appealed from, p. 559.

Cited in *Estate of Scott*, 124 Cal. 673, and *Bell v. Staacke*, 137 Cal. 308, noted under *Barnhart v. Fulkerth*, 92 Cal. 155; *Sutter Co. v. Tisdale*, 128 Cal. 181, as to failure to serve notice of intention to move for new trial.

Notice of Appeal need be served only on original parties or those who have made themselves parties to the record, p. 562.

Cited in *Trumpler v. Trumpler*, 123 Cal. 255, discussing right of successor in interest to move to recall remittitur; *Estate of McDermott*, 127 Cal. 452, denying right of surety to appeal from order settling probate account; *Estate of McDougald*, 143 Cal. 481, determining right of appeal of creditor who did not appear at settlement of accounts.

Notice of Appeal from new trial order need be served only on parties to the motion, p. 560.

To same effect in *Barnhart v. Edwards*, 111 Cal. 431, holding service on codefendant unnecessary when not party to motion; *In re Calkins*, 112 Cal. 298, holding service sufficient as made, and *Herriman v. Menzies*, 115 Cal. 25, ruling similarly.

Notice of Appeal.—“Adverse Parties” are such as so appear from record, p. 560.

To same effect in *In re Bullard*, 114 Cal. 463, 464, and *Kenney v. Parks*, 120 Cal. 24, cited under *Harper v. Hildreth*, 99 Cal. 265.

**110 Cal. 563-568. IN RE DELANEY.**

Executor's Commissions.—Extra allowance cannot be made, except for extraordinary services and unless petitioned for, p. 565.

To same effect in *Firebaugh v. Burbank*, 121 Cal. 191, holding contract for extra allowance to executor's attorney void.

Executor's Commissions are not allowable on property not belonging to estate, although inventoried, p. 565.

To same effect in *Horton v. Barto*, 17 Wash. 678, on point that appraised value is only a prima facie basis of computation.

Notice of Appeal from order settling executor's account need be served on him only, p. 567.

Qualified in *In re Bullard*, 114 Cal. 463, holding service necessary also on all others affected by appeal, and with rights adverse to appellants.

110 Cal. 568-579. **ROBERTSON v. BURRELL.**

Statute of Limitations.—Knowledge is imputed from means thereof where circumstances were such as to put one on inquiry, p. 574.

Cited in *Smith v. Martin*, 135 Cal. 254, noted under *Moore v. Boyd*, 74 Cal. 167.

Administrator is entitled to possession of property of estate pending distribution, p. 574.

To same effect in *Hearfield v. Bridges*, 75 Fed. Rep. 53, holding heirs barred by bar of administrator; *McGorray v. O'Connor*, 79 Fed. Rep. 864, denying right of heirs of deceased partner, before distribution, to redeem partnership property from foreclosure sale, and see S. C. 87 Fed. Rep. 589.

110 Cal. 579-582. **SCHLICHER v. HEMENWAY**; 52 Am. St. Rep. 116.

Complaint in Action to recover deposited purchase money paid to executor, against executor individually and also as executor of the estate, is demurrable for misjoinder, p. 581.

Approved in *Nickals v. Stanley*, 146 Cal. 727, arguendo; *Valley Nat. Bank v. Crosby*, 108 Iowa, 653.

110 Cal. 598-604. **PEOPLE v. SHAUGHNESSY.**

Reasonable Doubt.—Instruction sustained, p. 604.

Cited in *People v. White*, 116 Cal. 19, sustaining similar instruction.

110 Cal. 605-609. **IN RE WELCH.**

Administrator cannot be controlled by court as to manner of keeping estate funds, p. 608.

To same effect in *De Greayer v. Superior Court*, 117 Cal. 643, 645, 59 Am. St. Rep. 221, 223, applying rule to guardians. Cited in *Estate of Sarment*, 123 Cal. 337, reversing order requiring him to pay moneys over to clerk of court.



**110 Cal. 609-614. PEOPLE v. KAMAUNU.**

**Appeal.**—Error in criminal case will be presumed injurious if question of injury cannot be determined, p. 612.

Cited in *People v. Richards*, 136 Cal. 129, as to instructions, where record did not contain evidence.

**Misconduct of District Attorney** is not reversible error when not prejudicial, p. 613.

To same effect in *People v. Sears*, 119 Cal. 271, as to improper examination by him. Cited in *People v. Mathews*, 139 Cal. 528, where court checked attorney and instructed jury to disregard remarks.

**General Citation.**—*Winston v. United States*, 172 U. S. 313.

**110 Cal. 614-620. BUTLER v. ASHWORTH.**

**Parties.**—Joint Tort-feasors may be sued separately or together, p. 618.

Cited in *Grundel v. Union Iron Works*, 127 Cal. 442, 78 Am. St. Rep. 78, holding erroneous the dismissal of action as to certain defendants because plaintiff had filed claim against the others in limited liability proceedings, but had recovered no judgment.

**General Citation.**—*Miller v. Beck*, 108 Iowa, 578.

**110 Cal. 621-624. SEHORN v. WILLIAMS.**

**Auditor must Draw Warrant** for claim allowed by board, p. 624.

Cited in *White v. Hayden*, 126 Cal. 623, noted under *McFarland v. McCowen*, 98 Cal. 330.

**110 Cal. 624-627. CONLAN v. SULLIVAN.**

**Mistake.**—Vendee rescinding for, cannot recover expenditure made upon property unless it was benefited thereby, p. 627.

To same effect in *Bacon v. Thornton*, 16 Utah, 143, discussing liability of owner to one in bona fide possession under color of title.

**110 Cal. 627-632. KEENER v. EAGLE LAKE ETC. CO. S. C. see PURSER v. CADY, 120 Cal. 217.**

**Laborers' Liens** under Stats. 1891, p. 195, can be acquired only in cases specified in the statute, p. 630.

To same effect in *Ackley v. Mining Co.*, 112 Cal. 44, holding lien not acquired; *Slocum v. Irrigation Co.*, 122 Cal. 556, holding act unconstitutional as being special. Cited in *Johnson v. Goodyear Min. Co.*, 127 Cal. 20, 78 Am. St. Rep. 32, discussing and holding void statutes of 1897, page 231; *Skinner v. Garnett etc. Co.*, 96 Fed. 741, 742, also holding later act void.

110 Cal. 632-637. **VISALIA ETC. R. R. CO. v. HYDE**; 52 Am. St. Rep. 136, note 138.

Corporate Stockholder is not relieved from liability for assessments by transfer of stock to another after levy, p. 636.

See note to *Buck v. Ross*, 57 Am. St. Rep. 81, on withdrawal of assets.

110 Cal. 638-643. **KROUSE v. WOODWARD**.

Pledge.—Specific Performance may be obtained by pledgor for return of his stock, where he cannot obtain other shares in the market, p. 642.

Cited in *Glock v. Howard etc. Co.*, 123 Cal. 8, 69 Am. St. Rep. 23, discussing right to specific performance as to personality.

Same.—Pledgor cannot insist on return of identical shares, p. 643.

Cited in *Morris v. East Side etc. Co.*, 104 Fed. 417, noted under *Akins v. Gamble*, 42 Cal. 86.

110 Cal. 644-654. **BROWN v. CAMPBELL**.

Estoppel by Judgment must be specially pleaded, p. 649.

Cited in *McLean v. Baldwin*, 136 Cal. 569, noted under *Cave v. Crafts*, 53 Cal. 135; *Rodgers v. Pitt*, 96 Fed. 677, on point that objection to means had to acquire jurisdiction is waived unless seasonably taken.

Miscellaneous.—Estate of *Sutro*, 143 Cal. 490, *arguendo*.

110 Cal. 655-658. **WHEELER v. DONNELL**.

Misdemeanor in Office.—Proceedings under section 772, Penal Code, are criminal in nature, p. 656.

To same effect in concurring opinion in *Kilburn v. Law*, 111 Cal. 242, discussing jurisdiction of superior court therein.

110 Cal. 658-668. **PARKE v. WHITE RIVER L. CO.**

Surety.—Property Mortgaged for another's debt is discharged by alteration of contract between debtor and mortgagee, p. 665.

Cited in *Casey v. Gibbons*, 136 Cal. 371, but holding aliter when mortgagor was a principal, upon whose faith and credit the loan was made; and cf. *Sather etc. Co. v. Briggs Co.*, 138 Cal. 737, holding main case inapplicable.

110 Cal. 669-674. **PIERCE v. BIRKHOLM**.

Appeal from Judgment may be taken pending appeal from order granting new trial, p. 672.

Cited in *Smith v. Superior Court*, 136 Cal. 18, but holding rule inapplicable as to such appeal in divorce suit, when sought to be used to resist order for payment of maintenance in another action.

Effect of Appeal from order granting new trial is to leave judgment at large, p. 672.

To same effect in *Henry v. Merguire*, 111 Cal. 2, dismissing appeal from judgment taken thereafter, as taken too late; *Mountain etc. Co. v. Bryan*, 111 Cal. 38; dissenting opinion in *Storke v. Storke*, 116 Cal. 55; *Etchas v. Orena*, 121 Cal. 272, holding appeal from judgment inoperative on affirmance of order granting new trial; *Puckhaber v. Henry*, 147 Cal. 425, order granting new trial does not affect duty to file transcript on appeal from judgment with diligence.

110 Cal. 674-686. **POTTER v. AHRENS.**

**Goodwill.**—Vendor of business is estopped to deny ownership of goodwill, p. 679.

Cited in *Merchants' Ad. Sign Co. v. Sterling*, 124 Cal. 434, 71 Am. St. Rep. 98, but holding rule inapplicable as to sale of stock in trading corporation.

Liquidated Damages may be agreed upon in contract for sale of goodwill, when vendor agrees not to continue like business in same city, p. 681.

Cited in *Frans v. Beller*, 126 Cal. 181, noted under *Brown v. Kling*, 101 Cal. 299.

**General Citation.**—*Tobler v. Austin*, 22 Tex. Civ. App. 109.

110 Cal. 687-694. **MCCARTHY v. MT. TECARTE ETC. CO.**

**Assignment.**—Settlement between debtor and assignor after notice of assignment is no defense as against assignee, p. 691.

See note to *Graham etc. Co. v. Pembroke*, 71 Am. St. Rep. 35.

Where Bill of Particulars is Delivered Six Days after Demand, and more than forty days before trial, objection to reception of evidence for failure to serve bill within five days after demand is properly overruled, pp. 692, 693.

Approved in *Silva v. Blair*, 141 Cal. 602, where bill of particulars was furnished after lapse of statutory period, but was served more than one month before trial, allowance of evidence was discretionary.









